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Les Cahiers de droit

The Legal Impact of the *Canada-United States Free Trade Agreement* on Canadian Water Exports

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Volume 34, Number 2, 1993

URI: https://id.erudit.org/iderudit/043226ar
DOI: https://doi.org/10.7202/043226ar

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Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this article

Dufour, S. (1993). The Legal Impact of the *Canada-United States Free Trade Agreement* on Canadian Water Exports. *Les Cahiers de droit*, *34*(2), 705–762. https://doi.org/10.7202/043226ar

Article abstract

In recent years, the issue of Canadian water exports has assumed a prominent position on the policy agenda of both Canada and the United States. As water supplies in several western states of the U.S.A. have been increasingly depleted over the past three decades, the threat of a water crisis has raised interest in the possibility of diverting Canadian waters, originating presumably in the Great Lakes Basin. While the beginning of the 1980s has already witnessed a number of heated debates over Great Lakes water transfers, the signing of the *Canada-United States Free Trade Agreement* on the 2nd of January 1988, revives the polemic since it is viewed by some as a new menace to the future supply of Canadian waters.

The present paper, which is divided in two parts, begins with an examination of a number of events which have raised significant concern about the prospect of major water transfers from the Great Lakes Basin, the latest being the conclusion of the *Canada-United States Free Trade Agreement*. It then analyses the legal effects of the Agreement on Canadian water resources. This study concludes that there is nothing in the deal to suggest that Canada has in any way conceded future access to its water resources to the United States.

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The Legal Impact of the *Canada-United States Free Trade Agreement* on Canadian Water Exports*

Sophie DUFOUR**

L'exportation des eaux canadiennes est un sujet ayant occupé, au cours des dernières années, une place importante au sein des programmes respectifs des gouvernements canadien et américain. Cela est dû, en grande partie, à la solution préconisée par certains spécialistes afin de résoudre le problème de la diminution sans cesse croissante à laquelle font face plusieurs États américains en ce qui concerne leur approvisionnement en eau potable. Cette solution repose en effet sur le transfert d'eaux canadiennes, présumément celles du bassin des Grands Lacs, vers les États-Unis.

Alors que le début des années 1980 est l'occasion de débats houleux sur la question du transfert des eaux des Grands Lacs, la signature de l'Accord canado-américain de libre-échange, *le 2 janvier 1988, a pour effet de raviver la polémique, certaines personnes étant d'avis que l'entente met en péril l'avenir des eaux canadiennes.*

Divisé en deux parties, le présent article consiste d'abord en un examen d'un certain nombre d'événements à l'origine de l'inquiétude relative à la possibilité de transférer les eaux du bassin des Grands Lacs vers les États-Unis, le dernier de ces événements étant la signature de l'Accord canado-américain de libre-échange. *À cet examen fait suite une analyse des effets juridiques de l'entente sur les eaux canadiennes. Cette*

* This essay is a revised and updated version of a thesis submitted in August 1990 to the Faculty of Graduate Studies of Osgoode Hall Law School, York University (Ontario, Canada) in partial fulfillment of the requirements for the degree of Master of Laws (LL.M.). The author gratefully acknowledges the help of Professor Sharon A. Williams for her thoughtful supervision as well as her valuable suggestions, criticisms and comments.

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Les Cahiers de Droit, vol. 34, n° 2, juin 1993, p. 705–762
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analyse conduit l'auteure à la conclusion que le Canada n'a pas, aux termes de cet accord, concédé aux États-Unis l'accès futur à ses ressources en eau potable.

In recent years, the issue of Canadian water exports has assumed a prominent position on the policy agenda of both Canada and the United States. As water supplies in several western states of the U.S.A. have been increasingly depleted over the past three decades, the threat of a water crisis has raised interest in the possibility of diverting Canadian waters, originating presumably in the Great Lakes Basin. While the beginning of the 1980s has already witnessed a number of heated debates over Great Lakes water transfers, the signing of the Canada-United States Free Trade Agreement *on the 2nd of January 1988, revives the polemic since it is viewed by some as a new menace to the future supply of Canadian waters.*

The present paper, which is divided in two parts, begins with an examination of a number of events which have raised significant concern about the prospect of major water transfers from the Great Lakes Basin, the latest being the conclusion of the Canada-United States Free Trade Agreement. *It then analyses the legal effects of the Agreement on Canadian water resources. This study concludes that there is nothing in the deal to suggest that Canada has in any way conceded future access to its water resources to the United States.*

Water is a most valuable resource. It is viewed as essential to the territorial integrity of a nation for a number of reasons including its non-substitutability, its importance for life and the key role it plays in the economic and social development of the very fabric of society. In Canada, water is not merely considered as a resource commodity. It constitutes a prominent feature in this country's landscape and as a result, has profoundly influenced Canadian settlement patterns, heritage values and political relations.

A glance at a map reveals how closely Canada and the United States are joined by fresh water. Along the total 5,630 kilometre (3,500 mile) length of the boundary, extending from the Atlantic Ocean to the Pacific,

nearly 300 lakes, rivers and streams straddle or cross the border in both directions, making each country at one and the same time, both upstream and downstream, riparian partners in the same river basin. It is, therefore, not really surprising that transboundary water issues have been a fact of life in Canadian-U.S. relations dating as far back as the last century. Given the deep-rooted economic, social and historical status accorded to water in both nations, controversy over use of this resource is likely to persist, if not intensify, especially as the availability of adequate water supplies rapidly becomes one of the most serious long-range problems now facing several U.S. Western states. Indeed, this problem of diminishing water resources is potentially more serious than the energy crisis of the 1970s.

In seeking a solution to this projected water crisis, attention has recently turned to the Great Lakes — the world's single largest fresh water storage basin. Proposals for interbasin water diversions from the Lakes have occasionally raised numerous issues which have led to profound disagreement between Canada and the United States[1]. Proponents of such projects affirm that these technological measures represent the most efficient means of dealing with a particular problem of water scarcity. In the case of the more far-reaching proposals, their proponents maintain that such schemes would also generate considerable employment and economic benefits. Opponents, however, claim that any further diversions in the water resources of the Great Lakes would pose grave threats to the environment, create substantial navigational impediments on the Lakes and hinder the economic growth of the region. Concerns over such interbasin transfers reached a peak of media coverage and speculation through the intense polemic provoked by the suggestion that Canada's water is « for sale » under the *Canada-United States Free Trade Agreement*[2] signed by Prime Minister Brian Mulroney and former President Ronald Reagan on the 2nd of January 1988. Despite the assertion made by the then Minister for International Trade, John Crosbie, that Canadian waters are not covered under the treaty, a handful of powerful politicians and environmentalists have persistently and vociferously claimed that the *Canada-United*

1. For the purpose of this study, « diversion » and « transfer » will be used synonymously and are defined as « the artificial withdrawal of water by ditch, canal, pipeline or other means from its natural channel for use/discharge [...] in another channel or drainage basin » : F. QUINN, « Water Transfers — Canadian Style » *Canadian Water Resources Journal*, vol. 6, no. 1, 1981, p. 64 at 65.
2. *Canada-United States Free Trade Agreement*, 22 December 1987, reprinted in 27 I.L.M. 281 and as a schedule to the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65 [hereinafter *Canada-United States Free Trade Agreement*].

States Free Trade Agreement creates uncertainty as to the future of the country's water supply.

As the demand for this resource continues to increase significantly on both sides of the border, the idea of diverting Canadian waters — presumably from the Great Lakes Basin, the major focus of interest at the present time — to the United States is likely to generate serious tension in Canada-U.S. relations in the remaining years of the twentieth century. Whatever its outcome, this matter will inexorably have far-reaching implications for water allocation in North America.

The present paper attempts to clarify the tremendous controversy surrounding the Canadian water export issue and, more particularly, the Great Lakes interbasin diversion question. The first part discusses a number of events which have stirred up considerable apprehension about future control over the vast water resources of the Great Lakes Basin, the latest being the coming into force of the *Canada-United States Free Trade Agreement*. The second part analyses the legal effects of the Agreement on Canadian water resources. As will be demonstrated, this analysis leads the author to affirm that Great Lakes water diversions to the U.S. West and Southwest remain a distant prospect for, at the very least, the foreseeable future.

1. The Great Lakes Waters: A Paradise for Water Export Proposals

The waters of the Great Lakes constitute a unique, invaluable, yet long underestimated asset. They have traditionally been taken for granted and regarded as if their availability would last *in perpetuum*. This historical undervaluation of the Great Lakes has been, however, significantly reversed in recent years. Recognition that the Lakes provide a vital yet fragile and exhaustible resource is gradually emerging as a result of the occurrence of some momentous political, social, legal and environmental events which have affected these great bodies of water.

1.1 Description of the Great Lakes Basin

As a legacy of the last ice age 12,000 years ago, the five interconnected Great Lakes — Superior, Michigan, Erie, Huron and Ontario — enjoy an unparalleled global prominence. With their 22.7 quadrillion litres (6 quadrillion gallons) of fresh water — that is to say, 20 per cent of the world's and 95 per cent of North America's surface water[3] — the Lakes are the most

3. See INTERNATIONAL JOINT COMMISSION, *Great Lakes Diversions and Consumptive Uses: A Report to the Governments of the United States and Canada under the 1977 Reference*, Washington, D.C., 1985, p. 7 [hereinafter *International Joint Commission* or *IJC*].

important natural resource shared by the United States and Canada[4]. They play a valuable role in the national economies of both countries and are tightly linked to the region's quality of life. In 1984, the Center for the Great Lakes[5] undertook a study on the significance of the Lakes for the Basin's economy[6]. The report noted some of the most important beneficial uses of the Lakes. They provide a reliable source of fresh water for one-fifth of U.S. and one-half of Canadian manufacturing, they generate more than forty-three billion kilowatt hours of hydroelectric power in the United States and Canada and make water available for steam condensers and boilers in seventy U.S. power plants, they supply 26 million people with drinking water, they serve as an important route for shipping commercial cargo, and they ensure an extensive recreation and tourism industry, estimated to yield between $ 8 billion and $ 12 billion annually. This extensive utilization of the Great Lakes is expected to continue. In a 1985 report, the International Joint Commission [hereinafter the *IJC* or the *Commission*][7] concluded that consumptive uses of water in the Great Lakes Basin are likely to double by the year 2000[8].

4. As a whole, the Great Lakes-St. Lawrence system provides a continuous 6,120 kilometres (3,800 miles) deep-draft waterway which extends from the heart of the continent to the Atlantic coast, touching on eight U.S. states (Illinois, Indiana, Michigan, Minnesota, New York, Pennsylvania, Ohio and Wisconsin) and two Canadian provinces (Ontario and Quebec).
5. The Center for the Great Lakes is a private, non-profit organization created to provide an integrated binational focus for developing effective programs to manage, conserve and regulate the Great Lakes region's natural resources.
6. CENTER FOR THE GREAT LAKES, *The Lake Effect : Impact of the Great Lakes on the Region's Economy, a Report to the Council of Great Lakes Governors*, by C. THUROW, G. DANIEL, and T.H. BROWN, Chicago, 1984.
7. Established under the *Canada-United States Boundary Waters Treaty of 1909* (*Treaty Relating to Boundary Waters and Questions Arising with Canada*, 11 January 1909, United States-United Kingdom, 36 Stat. 2448, T.S. No. 548, U.K.—T.S. 1910 No. 23, reprinted in (1910) 4 *Am. J. Int'l L.* (Supp.) 239, *Treaties and Agreements Affecting Canada, in Force Between His Majesty and the United States of America 1814-1925*, Ottawa, King's Printer, 1927, p. 312 [hereinafter *Boundary Waters Treaty*]), the IJC is the only permanent joint public institution operating in Canadian-U.S. environmental relations. It consists of six members, three appointed by each federal government. The members act not as representatives under instruction from their governments, but as a single body pursuing what may be characterized as a mutual or common interest. For a discussion of the role of the Commission under the Treaty, see L.M. BLOOMFIELD and G.F. FITZGERALD, *Boundary Waters Problems of Canada and the United States*, Toronto, Carswell, 1958 [hereinafter *Boundary Waters Problems of Canada and the United States*] ; R. SPENCER, J. KIRTON and K.R. NOSSAL (eds), *The International Joint Commission Seventy Years On*, Toronto, University of Toronto, 1981 ; J.E. CARROLL, *Environmental Diplomacy : An Examination and a Prospective of Canadian-U.S. Transboundary Environmental Relations*, Ann Arbor, University of Michigan Press,

Yet, consumptive uses are not the only factors which might noticeably reduce water supplies in the Great Lakes Basin. On the one hand, although in the last few decades the region has, on the whole, experienced higher precipitation levels than the historical norm, experts now think a man-made climatic change — the so-called « greenhouse effect » — is occurring which could cause a cyclical return to warmer and drier conditions in the Basin. While the working of the change in climate is not as yet perfectly understood, it is feared that the phenomenon will have a far-reaching impact on both the supplies of and demands for the waters of the Great Lakes. On the other hand, in the face of declining water reserves, several regions of the U.S. West and Southwest are now looking for alternatives. Diverting water from the seemingly plentiful Great Lakes Basin appears to be among the most appealing strategies considered up until now. For the leaders of the Basin area, such a prospect is quite unnerving, especially in the light of the warning issued by the IJC in this regard :

> The question [...] is whether institutions in the United States and Canada will be any better prepared to deal with a water crisis — should one occur in the decades ahead as some predict — than they were to deal with the energy crisis. While the Commission does not believe that there is now a critical situation, at least one that would be felt in the Great Lakes region with respect to the quantity of water, it questions whether the institutions of government are in a position to make thoughtful and forward-looking decisions about the use of water, should the need arise[9].

Cautionary remarks such as this one warrant a thorough discussion and scrutiny of the Great Lakes water diversion issue.

1.2 The Interbasin Water Diversion Threat

Given the myriad of obstacles that any proponent would have to overcome to divert Canadian waters to the U.S. West — interbasin diversions are outrageously expensive, environmentally destructive, legally complex and technologically intricate — one might conclude that insofar as the Great Lakes waters are concerned, the combination of these impediments makes the realization of such schemes wishful thinking. Yet, this does not seem to mean that they cannot be carried out. As Minnesota Senator David Durenberger observed : « the first principle of water policy

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1983, pp. 39-58 ; *Boundary Water Relations and Great Lakes Issues* (Research Paper No. 8), by D.G. LEMARQUAND, Ottawa, Inquiry on Federal Water Policy, 1985, pp. 14-33. For a discussion of the application of the *Boundary Waters Treaty* to a scheme designed to divert water out of the Great Lakes Basin, see *infra*, Section 1.2.4, « Fourth Factor : Lake Michigan's Unclear Status under the Boundary Waters Treaty of 1909 ».

8. INTERNATIONAL JOINT COMMISSION, *supra*, note 3, pp. 30-37.
9. *Id.*, p. 48.

in the United States is that rational thinking does not apply [...] Water is a political, not an economic, commodity[10]. »

While the spectre of spreading water shortages in the United States has been the principal catalyst in fostering the implicit threat of massive out-of-basin water diversions, five other significant factors have collectively assisted in placing the issue high on the agenda of the eight states and two provinces surrounding the Great Lakes Basin.

1.2.1 First Factor: The Impending Water Crisis in the United States

1.2.1.1 Water's Place in the Western States of the United States[11]

The American West is « the land where life is written in water[12] ». That region lying between the one hundredth meridian (Dodge City, Kansas) and the Sierra Nevada mountains has traditionally been called the « Great American Desert »[13]. The name is by no means inaccurate since this vast land area receives an average annual rainfall of approximately 30 centimetres (12 inches) and is therefore virtually impossible to farm without irrigation.

The economic and political history of the West is intimately tied to water, or rather, to the lack of it. As pointed out more than a century ago by

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10. W.G. DAVIS, D.S. DURENBERGER and S. MATHESON, « Water for a Thirsty World — Are the Great Lakes in Danger ? » *The Great Lakes Reporter*, vol. 1, no. 2, 1984, p. 8 at 8-9. See also D. DURENBERGER, « Water Policy in the '80s » in *Futures in Water: Proceedings*, Toronto, Ontario Water Resources Conference, 12-14 June 1984, p. 172 at 173-174 [hereinafter *Water Policy in the '80s*]. Others share this view. For instance, the author Marc Reisner made the following comment in his book *Cadillac Desert* : « In the West [...] where water is concerned, logic and reason have never figured prominently in the scheme of things. As long as we maintain a civilization in a semidesert with a desert heart, the yearning to civilize more of it will always be there. It is an instinct that followed close on the heels of food, sleep, and sex, predating the Bible by thousands of years. The instinct, if nothing else, is bound to persist. » (M. REISNER, *Cadillac Desert*, New York, Penguin Books, 1986, pp. 14-15 [hereinafter *Reisner*]).
11. The western states are hereinafter defined as the seventeen states named in 43 U.S.C. s. 391 (Supp. 1992), which establishes the reclamation fund under the *Reclamation Act of 1902*, 43 U.S.C. ss. 371-616 (Supp. 1992) [hereinafter *Reclamation Act*]. These are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.
12. M.W. TADER, « Reallocating Western Water: Beneficial Use, Property, and Politics » (1986) *U. Ill. L. Rev.* 277 (quoting inscription from a wall of the Colorado State Capitol Building).
13. See *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 952-953, n. 13 (1982) (quoting *California* v. *United States*, 438 U.S. 645, 648 (1978)) [hereinafter *Sporhase*].

Colorado River pioneer explorer John Wesley Powell, water in the West is synonymous with power. In a report published in 1878[14], Powell recalled the two most significant features of the American West, its extensive tracts of land and its scarce water resources. Thus, to prevent a tiny handful of powerful irrigating companies from monopolizing the few manageable rivers of the West, Powell submitted two proposals. First, « [t]he right to use water should inhere in the land to be irrigated, and water rights should go with land titles[15] ». Secondly, the right, if unused after five years, should revert to the public trust[16]. In doing so, Powell reasoned that although this ensured an equitable use of water, it was not necessarily used efficiently. This brought him to the conclusion that irrigation systems would have to be built to overcome drier months and times of drought. Congress recognized this fact and the *Reclamation Act*[17] was promulgated on the 17th of June 1902. Henceforward, federally subsidized water projects would become a paramount attribute of the American West. These schemes have mostly benefitted irrigated agriculture which, in 1977, accounted for over 83 per cent of the total water consumed in the United States[18].

Although Powell is commonly recognized as the initiator of the reclamation program, his recommendations did not envision the chief component of reclamation as it actually materialized, which is the huge financial backing of irrigation works by Congress. His admonition that the West should tailor its expansion to conform to its limited water supplies[19] was totally rejected by Congress, with Senators from the West itself providing the harshest opposition[20]. Nonetheless, this unsuccessful effort at winning support for a more rational water use policy did not deject Powell. In fact, in October 1893 he reiterated his warning at an international irrigation congress held in Los Angeles : « I tell you, gentlemen, you are piling up a heritage of conflict and litigation [...] for there is not sufficient water to supply the land[21]. » The day of reckoning that Powell persistently cautioned about is now showing signs of appearing. Indications of an

14. J.W. POWELL, *Report on the Lands of the Arid Region of the United States, with a More Detailed Account of the Lands of Utah*, Cambridge, Belknap Press of Harvard University Press, 1962 [hereinafter *Powell*].
15. *Id.*, p. 54.
16. *Id.*, pp. 44-45.
17. *Reclamation Act*, *supra*, note 11.
18. See SOIL CONSERVATION SERVICE, *America's Soil and Water : Conditions and Trends*, Washington, D.C., U.S Department of Agriculture, December 1980, p. 21.
19. *Powell*, *supra*, note 14, pp. 16 and 33.
20. *Reisner*, *supra*, note 10, pp. 51-53.
21. W. STEGNER, *Beyond the Hundredth Meridian : John Wesley Powell and the Second Opening of the West*, Boston, Houghton Mifflin, 1962, p. 343.

impending water crisis are increasingly evident in several parts of the U.S. West and Southwest.

1.2.1.2 Water Shortages in the United States West

Richly endowed with water resources, the United States believed for a long time that its water supply was inexhaustible. However, as the United States' population and economy have expanded, the country's demand for water has spiraled upward. This has led to the realization that water, like most natural resources, is finite and that further supplies have to be found[22].

In spite of the fact that water supply shortages are identified throughout the nation, the West poses the most immediate and critical dilemma. For instance, within the Colorado River Basin, the current reservoirs possess a storage capacity five times the average annual flow of the river, and states which share the Basin have already committed virtually all of the river's flow to use. There appears to be no surplus for further allocation, and long-term scarcity seems unavoidable[23]. In addition, in some areas of southern Arizona, groundwater levels have declined as much as 122 metres (400 feet) since the 1940s[24]. Arizona's phenomenal rate of acquifer mining[25], which results from the state's dependence on groundwater for the bulk of its water supply, represents a serious threat to Arizona's future. In particular, this overdraft has given rise to salt water intrusion into the Colorado River, thus impairing its surface water usefulness for municipal, commercial and industrial purposes. It has also generated land subsidence and earth fissuring in certain parts of the state. As a consequence of this, severe damage has been caused to sewage systems, well casings and

22. See e.g., « Coast to Coast—Water Becomes a Big Worry » *U.S. News and World Report*, 6 September 1976, pp. 27 and 30.
23. See U.S. GEOLOGICAL SURVEY, *National Water Summary 1983—Hydrological Events and Issues, U.S. Geological Survey Water Supply Paper 2250*, Washington, D.C., U.S. Government Printing Office, 1984, pp. 23-29.
24. See ARIZONA DEPARTMENT OF WATER RESOURCES, *Management Plan: First Management Period: 1980-1990*, Phoenix, Arizona Department of Water Resources, 1984, p. 1 [hereinafter *Management Plan*].
25. Groundwater mining or overdrafting refers to « the condition when withdrawals are made from an acquifer at rates in excess of net recharge » : NATIONAL WATER COMMISSION, *Water Policies for the Future, Final Report to the President and to the Congress of the United States*, Washington, D.C., U.S. Government Printing Office, June 1973, p. XXV [hereinafter *Water Policies for the Future*]. In practical terms, this means that « sooner or later the underground supply will be exhausted or the water table will drop below economic pump lifts » (*ibid.*).

building foundations[26]. Yet, the water supply problem currently experienced in the High Plains region remains perhaps the most acute. The Ogallala Acquifer, a huge underground lake formed by receding waters of the Ice Age, is being heavily depleted, hence imperilling the extensive agricultural industry that has grown reliant on it[27].

According to a large body of opinion, no « water crisis » is currently afflicting the U.S. western states. However, the long-term validity of this assertion is dubious. In this regard, William E. Nothdurft, an eminent authority in the field of natural resources, has asked:

> Is the nation running short of water? Nationwide, the answer is clearly no [...] Regionally and locally severe water [...] quantity problems do exist, however [...] In general, though, supplies appear adequate to meet both existing needs as well as possible additional ones [...] These needs will not be met, however, unless major changes are made in the way water is developed, allocated, and managed. The major cause of the nation's water problems is not physical scarcity but outdated management institutions[28].

In short, notwithstanding reports of repeated water shortages from around the nation, most experts consider the United States to be endowed with bountiful water supplies that should be adequate to support the country for generations. But, they say, these supplies are being squandered through poor management and inefficient use to such a degree that the resource is increasingly and irreversibly running short in several regions. It is, therefore, essential to take a closer look at those institutional arrangements relating to water which are currently in place in the United States, to ascertain the veracity of the above contention.

1.2.1.3 Causes of the Water Shortages in the United States West

The historical response to the scarcity of water in the western states has been to generate more supply rather than to constrain the demand. Basically, this has meant building more dams, drilling more wells and importing water from other regions. Yet, as western water has considerably dwindled over the last few decades and has thus become much more valuable, one might have reasonably expected the implementation of some new water planning strategies to ensure a more efficient use of the resource. However, serious impediments have frustrated all attempts to

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26. *Management Plan, supra*, note 24, p. 30.
27. For a detailed discussion of the problems related to the Ogallala Acquifer overdraft, see *infra*, Section 1.2.3, « Third Factor: The 1982 High Plains-Ogallala Acquifer Regional Resources Study ».
28. W.E. NOTHDURFT, *Renewing America : Natural Resource Assets and State Economic Development*, Washington, D.C., Council of State Planning Agencies, 1984, p. 56 (footnote omitted) [hereinafter *Nothdurft*].

improve U.S. water quantity management. Among the most significant obstacles identified so far by scholars are included :

— the age-old method to meet U.S. water demand, the « Pork Barrel » approach ;
— the prevailing U.S. western doctrine of prior appropriation ; and
— the traditional system of nearly free sale of water.

The « Pork Barrel » Approach[29]

In the United States, Congress has traditionally demonstrated a strong reluctance to impinge upon states' rights in matters related to water management. This is evidenced by its purposeful and continued deference to state water law in the setting up of federal reclamation projects in the West[30]. Largely because of this deference, the federal government has never implemented any comprehensive, long-range national water policy. Nevertheless, this has not prevented it from spending over the years, billions of dollars in public funds to develop the nation's water supply. Most of these funds have been allocated to the western regions, more often than not at the expense of the eastern states[31].

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29. The expression « pork barrel » originated in the U.S. Southwest. As the author Reisner explained : « The phrase « pork barrel » derives from a fondness on the part of some southern plantation owners for rolling out a big barrel of salted pork for their half-starved slaves on special occasions. The near riots that ensued as the slaves tried to make off with the choicest morsels of pork were, apparently, a source of substantial amusement in the genteel old South. Sometime in the 1870s or 1880s, a wag decided that the habitual efforts by members of Congress to carry large loads from the federal treasury back to their home districts resembled the feeding frenzies of the slaves. The usage was quite common by the late 1880s ; and in 1890 it showed up in a headline in the New York Times, assuring its immortality » (Reisner, *supra*, note 10, p. 320).

30. See *Sporhase*, *supra*, note 13 at 959, note 19 (quoting *California* v. *United States*, 438 U.S. 645, 653 (1978)).

31. See P. ROGERS, « The Future of Water » *The Atlantic Monthly*, vol. 252, no. 1, 1983, p. 80 at 88 [hereinafter *Rogers*]. A case in point is provided by the U.S. Bureau of Reclamation. The agency was created in 1902, under the *Reclamation Act*, to encourage settlement in the American West through irrigation. By 1977, the Bureau had built 322 storage reservoirs, 345 dams, along with 112,650 kilometres (70,000 miles) of canals, pipelines and drains. In 1984, it supplied 31.4 billion litres (8.3 billion gallons) of water to irrigate over 4 million hectares (10 million acres) of land, an unquestionable testament to the success — in quantitative terms — of the 1902 legislation. However, enormous sums of money have been expended to ensure this accomplishment. Indeed, although the initial legislation called for repayment by farmers of all project construction costs, without interest during a 10-year period, it began to undergo a long and remarkable series of « reforms » a few years after its inception. The value of the subsidy to irrigators was increased significantly through extensions of the repayment time limit, authorizations

The consequences of this so-called federal water quantity management approach did not take long to come out into the open. Soon massive federally subsidized water projects became a useful tool for Congress to practice « pork barrel » politics, distributing government-financed construction plans among members' districts to improve their re-election prospects. In making political trade-offs, Congress usually approved almost any proposed water development programs, whatever their worthiness[32].

There is little doubt that, in 1902, federally subsidized water irrigation projects were crucial to the development of the U.S. western and southwestern states. Yet, the purpose underlying these projects was long ago achieved. In truth, over the years, huge federal subsidies have, at tremendous public cost, created isolated areas within the American West where water is still viewed and treated as a virtually free resource. This, ultimately, has added to the West's scarcity problem instead of reducing it.

The Prevailing Doctrine of Prior Appropriation in the United States West

In order to gain a thorough understanding of the water allocation dilemma now confronting the United States, it is also essential to have a good grasp of the way surface water law has developed throughout the nation[33].

The legal framework in relation to water regulation differs among the various states and may be divided geographically by the Mississippi River.

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for periods with no repayment obligation, and combinations of irrigation and power projects which allowed revenues from hydroelectric power to cover irrigation costs that exceeded the farmers' « ability to pay » : see *Water Policies for the Future*, *supra*, note 25, pp. 485-487 ; R. BROWNSTEIN and N. EASTON, « The Wet, Wet West » *The Washington Monthly*, November 1981, pp. 43-46 [hereinafter *The Wet, Wet West*].

32. See K.D. FREDERICK, « Water Supplies » in P.R. PORTNEY (ed.), *Current Issues in Natural Resource Policy*, Baltimore, John Hopkins University Press, 1982, p. 216 at 243 ; *The Wet, Wet West*, *supra*, note 31, p. 48 ; R.C. BOCKING, *Canada's Water for Sale*, Toronto, James Lewis and Samuel, 1972, p. 5.

33. For historical reasons, laws controlling the extraction and use of groundwater have evolved under a regime different from that governing surface water rights. As a general proposition, the states have applied one of the four following principles : the English Rule of Absolute Ownership, the American Rule of Reasonable Use, the Prior Appropriation System or the Correlative Rights Doctrine created by the California courts. For a discussion of the evolution of groundwater rights in the United States, see, e.g., F.J. TRELEASE, « Developments in Groundwater Law » in Z.A. SALEEM (ed.), *Advances in Groundwater Hydrology*, Minneapolis, American Water Resources Association, 1976, p. 271 at 271-278.

For their part, the humid eastern states borrowed the doctrine of riparian water rights from the English common law[34]. Under the riparian system, title to land bordering a stream gives the title-holder the right to a reasonable use of the flowing waters, so long as the use does not interfere with the rights of other riparian owners. The riparian water right exists in perpetuity, and is neither created by use nor lost through non-use. The riparian owner is basically a co-user with all other such owners on the water source, and, in regard to various riparian uses, priority of use does not establish priority of right in times of decreased flow. Because of their nature therefore, riparian rights are not quantifiable. Rather, the amount of water used may vary over time, depending on the extent of reasonable use.

In the West, however, the greater scarcity of water, coupled with the need for certainty in its use, led to the emergence of the doctrine of prior appropriation[35]. The doctrine, which evolved out of the mining camps in California[36], rests on a few simple principles and concepts. To begin with, in contrast with the riparian system, appropriative water rights are not tied to use on land bordering a stream or a water body. Instead, the right to water use is acquired by diverting the resource from its natural channel and putting it to some « beneficial » use. Each appropriator must apply to a state agency for a permit. This state agency has to decide whether there is still unappropriated water for the use and whether the use is beneficial. If the use does not appear to be contrary to the public interest, then an exact amount of water, which can be appropriated is determined. Secondly, failure to put the resource to a beneficial use may result in the loss of the right. This fundamental aspect of the doctrine is known as the « use it or

34. See generally A.D. TARLOCK, « Inter and Intrastate Usage of Great Lakes Waters : A Legal Overview » (1986) 18 *Case W. Res. J. Int'l L.* 67, 68-75 ; W.A. HUTCHINS, « Background and Modern Developments in State Water-Rights Law » in R.E. CLARK (ed.), *Waters and Water Rights : A Treatise on the Law of Waters and Allied Problems : Eastern, Western, Federal*, vol. 1, Indianapolis, Allen Smith, 1967, p. 57 at 66-71 [hereinafter *Hutchins*] ; F.J. TREALEASE, *Water Law : Resource Use and Environmental Protection*, 2d ed., St. Paul, West, 1974, pp. 238-434 [hereinafter *Resource Use and Environmental Protection*].

35. See generally *Hutchins*, *supra*, note 34, pp. 74-83 ; *Resource Use and Environmental Protection*, *supra*, note 34, pp. 22-237 ; G.E. RADOSEVICH, « Better Use of Water Management Tools » in M.R. DUNCAN (ed.), *Western Water Resources : Coming Problems and the Policy Alternatives*, Boulder, Westview Press, 1980, p. 253 at 261-267 [hereinafter *Radosevich*]. The doctrine of prior appropriation has been adopted by all seventeen western states as the basis of their surface water law, although some have maintained certain elements of the riparian system.

36. See C.W. MCCURDY, « Stephen J. Field and Public Land Law Development in California, 1850-1866 : A Case Study of Judicial Resource Allocation in Nineteenth-Century America » (1976) 10 *Law and Society Rev.* 235.

lose it » principle. Finally, water use is administered under the rule of « first in time, first in right ». Simply put, the water right has priority over all rights acquired afterwards whereas it is subordinate to all previously acquired rights. Thus, in times of scarcity, the full burden of the shortfall is borne by the junior water right holders.

While the rationale underlying the doctrine of prior appropriation is in no way questioned, it remains indisputable that several features of western water law, as it has actually evolved, not only allow an inefficient use of the resource, but even worse, almost guarantee it by reducing or eliminating the incentives and opportunities for transferring water from lower- to higher-value uses. These features include :

— the above-mentioned « use it or lose it » principle which, although designed to prevent wasteful water use, has, in effect, induced such waste by discouraging conservation of the resource. The water right holders are faced with a situation in which any effort to use water more efficiently can result in a forfeiture of rights[37] ;

— some western states still do not allow transfers of water away from the land to which the resource was originally appurtenant. The restriction had initially been intended to deter fraudulent land and water sales common to early settlement schemes. However, to the extent that appurtenancy provisions impair water transfers to higher-value uses, they clearly hinder optimal efficient water uses[38] ;

— the « third party effect » principle represents perhaps the most malicious impediment to the promotion of western water use efficiency. Under this rule, transfers of appropriative rights are forbidden if other water right holders are expected to be injured by the transaction. Yet, given the common property nature of the resource, transfers having no impact on the quantity or quality of either the surface or groundwater flows of some non-participating party are rather improbable. Attempts to settle

37. See *Radosevich*, *supra*, note 35, pp. 266-267 ; *Nothdurft*, *supra*, note 28, pp. 62. In this respect, the author Reisner noted : « In the East, to « waste » water is to consume it needlessly or excessively. In the West, to waste water is not to consume it — to let it flow unimpeded and undiverted down rivers. Use of water is, by definition, « beneficial » use [...] even if it goes to Fountain Hills, Arizona, and is shot five hundred feet into 115-degree skies » (*Reisner*, *supra*, note 10, p. 12).

38. See B. DRIVER, *Western Water : Tuning the System, The Report to the Western Governors' Association from the Water Efficiency Task Force*, Denver, Western Governors' Association, July 1986, p. 26 [hereinafter *Driver*].

potentially complex disputes can therefore be tediously long and very expensive, especially if litigation is ultimately launched[39].

Hence, owing to the way it has effectively developed over the years, the doctrine of prior appropriation dissuades western water right holders from saving water, no matter how scarce it may be. Thus, unless western water laws and institutions are significantly reformed, the American West can anticipate steadily increasing water shortages to such an extent that substantial portions of the area will sometime soon be faced with an unprecedented exigency.

The Traditional System of Nearly Free Sale of Water

The pattern of maintaining urban water prices below real cost has been common practice in many areas of North America. Yet, this appears particularly notable in those parts of the American Southwest which are most vociferous in pleading shortages and which most frequently propound their need for importation of water from other regions of the continent[40].

One does not need to be an economist to figure out the consequences of undervaluing water. In a society that puts a dollar value on just about everything, the result of low prices for water is obvious. If water is available at no or at an absurdly low cost, it generates high and possibly insatiable demand. When the quantity requested outstrips the one supplied — as is true nearly everywhere in the U.S. West — water users must be given a reason, an economic incentive, to curtail consumption. At the present time, such an incentive does not exist. What may therefore be seen as waste or inefficient water use in rural and urban areas represents simply the users' logical response to low water prices. Users can only afford such behavior when water is excessively cheap.

Herein lies certainly one of the chief reasons for the lack of attention to water conservation and the current interest in the use of Great Lakes waters to supply the U.S. Southwest. Abel Wolman, Professor Emeritus of Environmental Engineering at Johns Hopkins University and one of the world's leading experts in water resources, was quoted in the *New York Times* as saying: « Water is cheaper than dirt. That means there is no

39. *Id.*, p. 16 ; F.J. TRELEASE, « Water Law, Policies and Politics : Institutions for Decision Making » in M.R. DUNCAN (ed.), *supra*, note 35, p. 199 at 205-206 ; H.S. BURNESS and J.P. QUIRK, « Water Law, Water Transfers, and Economic Efficiency : The Colorado River » (1980) 23 *J.L. & Econ.* 111, 123.

40. See R. REINHOLD, « Nation's Water Is Bountiful, but Supplies Are Squandered » *The New York Times*, 9 August 1981, p. 48 [hereinafter *Supplies Are Squandered*] ; *Rogers*, *supra*, note 31, p. 86.

orderly design as to when and where to use it. In a vast country such as ours we have never been able to organize a thoughtful, logical national plan, and I am very doubtful we ever will[41]. »

1.2.1.4 Effect of the Impending Water Crisis in the United States on the Great Lakes Basin Water Resources

The immediate reaction to the imminent water crisis in the western and southwestern parts of the United States has been to search for more water from elsewhere ; the « traditional, structural approach, [whereby] projected levels of water use are treated as requirements that must be met, regardless of cost[42] ». This typical attitude has prompted those water-scarce areas to call for other U.S. and Canadian regions, ostensibly more bountifully endowed with water, to extricate them by diverting the « priceless » resource into the arid Southwest. As a result, the Great Lakes — the largest single fresh water storage basin in North America — have become one of the most inviting targets to turn to for the alleviation of water shortfalls in the western U.S. Quite naturally, such a possibility is taken very seriously by the governors of the Great Lakes states and the premiers of the Canadian provinces of Ontario and Quebec, notwithstanding the fact that no proposal has yet materialized.

1.2.2 Second Factor : Migration of Population to the United States Sun Belt

In the past two decades, a continuous and rapid migration of population and industry has been observed from the more northerly regions of the United States to the Sun Belt, the southern tier of states stretching from California to Florida. Between 1970 and 1980, the population of the arid West increased by 22 per cent whereas the Great Lakes region gained a mere 4 per cent[43]. A 1984 U.S. Census Bureau study also indicated that these population trends have been even more pronounced during the first half of the 1980s than in the 1970-1980 period[44].

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41. *Supplies Are Squandered*, *supra*, note 40.
42. K.D. FREDERICK, « The Legacy of Cheap Water » *Resources*, vol. 83, 1986, p. 2.
43. See U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *Statistical Abstract of the United States*, Washington, D.C., U.S. Government Printing Office, 1981, pp. 10-11.
44. See « Sun Belt Bulges with Population Gain » *Chicago Tribune*, 22 November 1984, Section 1, p. 16.

This twenty-year shift in the population from north to south — which, in effect, has more than doubled the population of sun-belt states[45] — has not only contributed to intensify the already serious American water deficiency problem, but has also entailed a substantial reapportionment of congressional seats, thus granting water-scarce states more political clout than they have ever previously held[46]. The balance of political forces at the U.S. national level will therefore be critical to the future of Great Lakes Basin water diversion proposals. If states requesting imports can muster sufficient congressional support to surmount the opposition of the Great Lakes states, large-scale water transfers could take place, even though they are manifestly uneconomic and ecologically unsound[47].

1.2.3 Third Factor: The 1982 High Plains-Ogallala Acquifer Regional Resources Study

Another major factor behind the recently heightened apprehension that major diversions may threaten the waters of the Great Lakes Basin is the *1982 High Plains-Ogallala Acquifer Regional Resources Study* [hereinafter the *Study*][48]. The Study was undertaken in response to congressional concern over the continuing depletion of the Ogallala Acquifer and the potential implications of such a depletion for the region's economy.

1.2.3.1 The Ogallala Acquifer: The Alarming Overdraft

The Ogallala Acquifer, whose name derives from an Indian tribe that once roamed the High Plains, is believed to be the largest underground reservoir of fresh water in the world — an estimated 3,700 cubic kilometres (3 billion acre-feet) — covering 438,220 square kilometres (169,210 square miles) under the middle Great Plains states[49]. Precipitation forms the

45. See P.P. MICKLIN, « Inter-basin Water Transfers in the United States » in G.N. GOLUBEV and A.K. BISWAS (eds), *Large Scale Water Transfers: Emerging Environmental and Social Experiences*, Oxford, Tycooly, 1985, p. 37 at 42 [hereinafter *Micklin*].
46. See U.S.—C.Q., *Congressional Quarterly Weekly Report*, 17 April 1982, 890.
47. See V. QUADE, « Water Wars Predicted in a Thirsty Nation » (1982) 68 *A.B.A. J.* 1066, 1067; D.G. LEMARQUANT, « Preconditions to Cooperation in Canada-United States Boundary Waters » *Nat. Resources J.*, vol. 26, 1986, p. 221 at 227.
48. U.S. DEPARTMENT OF COMMERCE, *A Summary of Results of the Ogallala Acquifer Regional Study, with Recommendations to the Secretary of Commerce and Congress*, Washington, D.C., 1982.
49. HIGH PLAINS ASSOCIATES, *Six-State High Plains Ogallala Acquifer Regional Resources Study: Summary, a Report to the U.S. Department of Commerce and the High Plains Study Council*, Austin, 1982, pp. 2-1 and 2-2 [hereinafter *High Plains Associates*]. The Ogallala Acquifer underlies portions of Wyoming, South Dakota, Nebraska, Colorado, Kansas, Oklahoma, Texas and New Mexico.

primary source of recharge to the Acquifer. Because evapotranspiration is substantial, the rate of natural recharge is generally very low. Although this rate varies, the U.S. Geological Survey determined in 1982 that the average recharge ranges from less than 1.3 to 2.5 centimetres (0.5 to 1 inch) per year[50].

Before 1930, the Ogallala Acquifer was virtually untapped since most of the land of the High Plains was used for grazing and dryland farming. However, following the drought of 1930-39, the Acquifer became the principal source of water in this predominantly agricultural area as farmers started drilling for irrigation water. The burgeoning expansion of irrigated agriculture throughout the High Plains region has slowly been drawing down the water trapped in the Acquifer. In 1950, less than 8.6 cubic kilometres (7 million acre-feet) of water were withdrawn from the Ogallala for agricultural purposes. By 1980, water pumped annually from the Acquifer had increased to more than 26 cubic kilometres (21 million acre-feet)[51]. On the basis of the current rates of withdrawals, most experts predict that some portions of the Ogallala will be significantly depleted by the year 2000 and most others by 2020[52]. There are now fears that unless a new source of water supply is found in the near future, the agricultural production and the economy of the High Plains will be in jeopardy before very long.

1.2.3.2 The 1982 High Plains-Ogallala Acquifer Regional Resources Study

By authorizing this Study, the U.S. Congress recognized the overwhelming effects resulting from the depletion of the Ogallala Acquifer and, in particular, the potential exhaustion of this formation in the long run. Nevertheless, its response to these problems remained constant, that is to say, the adoption of a strategy focusing solely on supply augmentation with no regard for demand management[53]. The U.S. Army Corps of Engineers, a federal agency, was consequently requested to examine prospective inter-basin diversions from « adjacent areas », as one of six water management

50. *Id.*, pp. 2-10 and 2-11.
51. *Id.*, pp. 1-3.
52. See *Micklin*, *supra*, note 45 at 53 ; T.Y. CANBY, « Our Most Precious Resource : Water » *National Geographic*, vol. 158, no. 2, 1980, p. 144 at 158.
53. The congressional intent was made clear under s. 193 of Pub. L. No. 94-587 where the Secretary of Commerce was directed to « study the depletion of natural resources of those regions of the States of Colorado, Kansas, New Mexico, Oklahoma, Texas, and Nebraska presently utilizing the declining water resources of the Ogallala Acquifer, *and to develop plans to increase water supplies in the area* » (emphasis added).

strategies to be considered[54]. Investigation of « Strategy Five » — the « interstate water diversion » strategy — led the Corps to conclude that without massive interbasin transfers, groundwater levels would continue to decline with ultimate exhaustion in some parts of the region. Insofar as the Missouri River and the Arkansas streams were concerned, the Corps of Engineers found that :

— total investment and unit costs per acre foot would be far beyond the user's (farmer's) ability to pay, thus requiring massive government subsidies ;

— the amount of water available in the Missouri River Basin would be far less than that needed by the High Plains-Ogallala Acquifer area ;

— if interbasin transfer were to originate from the Missouri River, it would involve trade-offs with navigation downstream, reduce hydropower capacity and seriously affect fish, wildlife and the riparian habitat ; and

— there are limited amounts of surplus water in Arkansas ; therefore, diversions from the streams in that State would seriously affect Louisiana[55].

Hence, the above findings clearly pointed out that « Strategy Five » was hardly acceptable on either economic, environmental or political grounds. Nonetheless, although the Study did not consider a diversion from the Great Lakes, the Corps' conclusion that the Missouri River possesses very little surplus water raised questions about the potential combination of Great Lakes water with Missouri River water to fulfill the need[56]. As a result, the 1982 Study has sparked tremendous concern among

54. See *High Plains Associates*, *supra*, note 49, pp. 6-2, 6-53 to 6-93. As Congress had explicitly prevented the Corps from considering either the Columbia River Basin or the lower Mississippi River as possible sources for transfers, the words « adjacent areas » were therefore meant to refer exclusively to the Missouri River and to the streams in Arkansas : see H.O. BANKS, « Future Water Demands in the United States » in *The Interbasin Transfer of Water* [...] *The Great Lakes Connection*, Conference Sponsored by the Wisconsin Coastal Management Council, Milwaukee, Wisconsin, 10-11 May 1982, Navarre, Freshwater Society, 1982, p. 49 at 56 [hereinafter *Banks*].

55. *Banks*, *supra*, note 54, at 57. In addition, there appeared to be significant political resistance on the part of the Missouri River Basin States and the State of Arkansas to any diversions originating from their region (*ibid.*).

56. In fact, in 1983 the Michigan Water Resources Task Force at the University of Michigan completed a study intended to assess the costs involved in a major transfer of Lake Superior water into the Missouri River Basin to replace water diverted to supplement the Ogallala Acquifer : J.W. BULKLEY, S.J. WRIGHT, and D. WRIGHT, « Preliminary Study of the Diversion of 283 $m^3 s^{-1}$ (10,000 cfs) from Lake Superior to the Missouri River Basin » *Journal of Hydrology*, vol. 68, 1984, p. 461.

the Great Lakes jurisdictions ; it has not only highlighted the seriousness of the Ogallala Acquifer depletion but it has, above all, set a precedent for renewed consideration in the years ahead of interbasin water transfer as a potential remedy.

1.2.4 Fourth Factor : Lake Michigan's Unclear Status under the Boundary Waters Treaty of 1909

The Great Lakes and the connecting St. Lawrence Seaway form a common boundary between the United States and Canada. The official international border line runs through Lakes Ontario, Huron, Erie and Superior. Thus, from an international perspective, any proposed diversion that may conceivably affect the Lakes' level would normally require prior approval from the *IJC*, under Article III of the *Canada-United States Boundary Waters Treaty of 1909*[57]. Lake Michigan, however, is something of a special case. In the words of Minnesota Senator David Durenberger, it is a « wild card[58] » since it lies wholly within the United States, and the part of the lake which is the closest to Canada is situated at about 65 kilometres (40 miles) from the international frontier. It does not fall, therefore, within the definition of « boundary waters » contained in the Preliminary Article of the Treaty[59]. Regulation of diversions from water bodies such as Lake Michigan is reserved to the State where the resource is located, by virtue of Article II of the Treaty which in part reads : « Each of the High Contracting Parties reserves to itself [...] the exclusive jurisdiction and control over the [...] diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters ».

Nonetheless, Article II embodies a form of peremptory right concerning diversions of transboundary tributary waters undertaken in either

57. *Boundary Waters Treaty, supra*, note 7. Article III of the Treaty specifically provides that « no further [...] diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval [...] of [...] the International Joint Commission. »

58. *Water Policy in the '80s, supra*, note 10 at 174 (quoting former Ontario Minister of Natural Resources Alan Pope).

59. « Boundary waters » are defined in this section as those « lakes and rivers and connecting waterways [...] along which the international boundary [...] passes » and include « all bays, arms, and inlets thereof ». Yet, they do not comprise those « waters which in their natural channels would flow into such lakes, rivers and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary ».

country « resulting in any injury on the other side of the boundary ». Under this clause, the « injured parties » are entitled to « the same legal remedies as if such injury took place in the country where such diversion [...] occurs[60] » subject to the proviso that such a right of action does not apply to « cases already existing[61] ». The expression « injured parties » has, however, aroused serious controversy. It is not clear whether it refers solely to individuals or extends to High Contracting Parties as well. As to the intention of the negotiators of the *Boundary Waters Treaty*, the United States, at the very least, left little doubt that it viewed the matter as being restricted to private litigation[62]. Canada apparently conceded this interpretation in the context of the debate concerning the Columbia River diversion, although it did so in an attempt to prevent the United States from claiming any remedy under Article II of the Treaty[63]. Consequently, neither Canadian nor American federal interests, which might be harmed by any further transboundary tributary water diversions, could likely be indemnified through the compensatory clause contained in Article II.

Nevertheless, the final paragraph of Article II has somewhat safeguarded the right of Canada « to protest diversions [of waters] from Lake Michigan[64] » notwithstanding the fact that these are not boundary waters. This paragraph provides that neither party « intends [...] to surrender any right, which it may have, to object to any interference with or diversions of

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60. The implications of the terms used in this clause should not be overlooked. As Professor Sharon Williams commented : « [t]he remedy is dependent upon the *lex loci delicti*. This is not that effective a remedy as the diversion or use will presumably be lawful in that place » (S.A. WILLIAMS, « Public International Law and Water Quantity Management in a Common Drainage Basin : The Great Lakes » (1986) *18 Case W. Res. J. Int'l L.* 155, 182).

61. The proviso thus eliminates the rights of « injured parties » with regard to the Chicago Diversion which had long been in operation when the *1909 Treaty* was concluded. For a discussion of the Chicago Diversion, see *infra*, notes 67-70 and accompanying text.

62. A memorandum from Chandler Anderson, one of the U.S. drafters of the Treaty, stated : « The right of action for damages provided for in Article II applies to private or individual interests in distinction from public or governmental interests. Any question on the point is set at rest by the use of the words « injured parties ». Whenever the word « party » is used in a treaty, referring to the high contracting parties, a capital P is used, so the absence of the capital and the use of the word in the plural indicate that it can refer only to individuals » (CONGRESS, SENATE, *Hearings Before Subcommittee, Diversion of Water from Lake Michigan*, 85th Cong., 2d Sess. on H.R. 2 and s. 1123, 28 July-7 August 1958 at 108).

63. See *Boundary Waters Problems of Canada and the United States*, *supra*, note 7, pp. 47-48.

64. M. COHEN, « The Régime of Boundary Waters—The Canadian/United States Experience », in *Recueil des Cours : Collected Courses of the Hague Academy of International Law*, vol. 3, Leyde, A.W. Sijthoff, 1977, no. 146, p. 219 at 251.

waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary[65] ».

Yet as one writer observed, the Treaty establishes no guidelines for determining at what point a diversion would amount to « material injury » so as to trigger the procedure of demur included in Article II, nor any criteria as to how much consideration the United States should give to Canadian protests[66].

Hence, despite several endeavours to settle the issue, the status of Lake Michigan under the *Boundary Waters Treaty* continues to raise complex questions. Many are those who think it constitutes the most consequential loophole in the legal and diplomatic protections built up around the Great Lakes. Because Lake Michigan does not fall under the coverage of Article III of the Treaty, the Great Lakes states and provinces might not be able to veto a proposal for an interbasin water transfer via the Chicago Diversion to the U.S. West[67]. Nowadays, in particular, the idea is rapidly spreading that the Chicago Diversion, because of its connection with the Mississippi River watershed, could be used as a starting point for diverting water to the High Plains region to replenish the Ogallala Aquifer[68]. In fact, a proposal to divert water from Lake Michigan to the dry American Midwest was aired by the governor of Illinois in the summer

65. The navigation rights of Canada pertaining to the waters of Lake Michigan have been expressly maintained under Article I of the Treaty which states that « the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to [...] both countries [...] this same right of navigation shall extend to the waters of Lake Michigan. »

66. See D.C. PIPER, *The International Law of the Great Lakes*, Durham, Duke University Press, 1967, p. 95.

67. The Chicago Diversion, completed in 1848, involves the transfer of Lake Michigan waters through the Illinois waterway to the Mississippi River. The diversion is used mainly for water supply, sewage disposal, power generation and navigation. Due to its exclusion from the scope of the *1909 Treaty*, the Lake Michigan diversion at Chicago has generated some of the most boisterous disputes in Canadian-U.S. transboundary water relations. See, e.g., *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929) ; 281 U.S. 179 (1930) ; 289 U.S. 395 (1933) ; 388 U.S. 426 (1967) ; 449 U.S. 48 (1980). See also B. BARKER, « Lake Diversion at Chicago » (1986) 18 *Case W. Res. J. Int'l L.* 203.

68. As Minnesota Senator Durenberger explained : « We've diverted great rivers, created great reservoirs, so I can easily imagine an attempt to replenish great acquifers. But where would the water come from ? The question hasn't been answered, but interbasin transfers would be necessary and the Mississippi basin has high potential, particularly if it can be replenished by diversions from Lake Michigan through Chicago and the Illinois River. Today, the Chicago diversion is regulated at 3,200 cfs [...] But is [*sic*] has capacity for diversion at more than double that rate » (*Water Policy in the '80s*, *supra*, note 10 at 174-175).

of 1988 in order to relieve drought conditions on the lower Mississippi River[69]. On the 23rd of June 1988, the then Illinois Governor James R. Thompson asked the U.S. Army Corps of Engineers to consider a project to divert approximately 283 cubic metres per second (10,000 cubic feet per second) south from Lake Michigan to supplement the flow of the Mississippi River. The plan, which would have lasted roughly 100 days, would have entailed tripling the volume of water normally diverted from the Chicago Diversion. The request was vigorously opposed by the Canadian federal government together with the other Great Lakes states and provinces. On the 14th of July 1988, after several weeks of controversy that threatened to damage Canadian-U.S. relations, the Corps turned down the proposal. Despite the Corps' ultimate decision to dismiss the plan, it has reawakened the Great Lakes region's apprehension that an eternally parched U.S. West would turn northward in search of fresh water and bring influence to bear on Washington and Ottawa to export the region's most fundamental resource[70].

1.2.5 Fifth Factor : The United States Supreme Court Decision : *Sporhase* v. *Nebraska*

Pressure for large-scale diversions from the Great Lakes Basin has been rekindled by the U.S. Supreme Court decision, *Sporhase* v. *Nebraska*[71], where portions of a state statute seeking to prohibit interstate water transfers were declared unconstitutional.

1.2.5.1 State Restrictions on Interstate Transfers of Water

In the United States, most of the western states, recognizing the importance of the resource for their citizens and their economies, have

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69. See generally E. CAREY, « Parched U.S. Thirsts for Great Lakes » *Toronto Star*, 25 June 1988, Sections A-1 and A-10 ; M. BOURRIE, « U.S. Considers Water Diversion » *Globe and Mail*, 7 July 1988, Sections A-1 and A-2 ; A. MACKENZIE, « Ottawa Says U.S. Can't Just Take Water » *Toronto Star*, 8 July 1988, Section A-8 ; S. DELACOURT and J. LEWINGTON, « Canada Promised U.S. Consultation on Water Diversion » *Globe and Mail*, 9 July 1988, Section A-1 and A-2 ; J. CAHILL, « U.S. Decision on Great Lakes Seen as Canadian Victory » *Toronto Star*, 18 July 1988, Section A-16 ; S. MILLER, « The Great Lakes : An Economic System or an Ecosystem ? » in W. HOLM (ed.), *Water and Free Trade*, Toronto, James Lorimer, 1988, p. 75 at 86-88.

70. The proposal raised two important legal issues : 1) whether the Corps needed the U.S. Supreme Court's approval before acceding to Illinois' request ; and 2) whether the U.S. federal government was legally obliged, by virtue of the *1909 Treaty*, to consult Canada prior to the execution of such a diversion. While the former was answered categorically in the affirmative, the latter remained unsettled.

71. *Sporhase*, *supra*, note 13.

responded to the excessive and rapid exploitation of the dwindling fresh water supplies by taking steps to retain « their » resource for use within their boundaries. Different types of water embargo statutes have thus been enacted in those states. These statutes, which either ban or at the very least severely restrict the exportation of water to neighbouring states, raise one crucial legal issue : whether water embargo legislation imposes an impermissible burden on interstate commerce in violation of the U.S. Constitution's *Commerce Clause*[72]. It was not until seventy years after the promulgation of the first state statute of this kind[73] that the U.S. Supreme Court thoroughly examined the question in the *Sporhase* case.

1.2.5.2 *Sporhase* v. *Nebraska*

The appellants in *Sporhase* wished to transfer groundwater out of Nebraska to irrigate contiguous tracts of land in Colorado, but neglected to obtain a Nebraska permit to do so[74]. Nebraska law provided that a permit allowing interstate groundwater transfer would be granted if the withdrawal applied for was « reasonable [...] not contrary to the conservation and use of ground water, and [...] not otherwise detrimental to the public welfare[75] ». Most importantly, the statute also stipulated that the recipient state had to grant reciprocal rights to the state of Nebraska[76]. However, Colorado lacked such a reciprocity arrangement with Nebraska[77].

On the 2nd of July 1982, in a 7-2 decision, the U.S. Supreme Court held that groundwater was an article of commerce[78] and, while conceding that Nebraska had legitimate interests in regulating and conserving groundwater use[79], it found that the state's reciprocity provision unduly interfered

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72. The *Commerce Clause, U.S. Const.*, art. I, s. 8, cl. 3, empowers Congress to « [r]egulate commerce with foreign nations and among the several states, and with the Indian tribes ». The aim of the clause is to achieve national economic unity by promoting free trade and preventing protectionism. The *Commerce Clause* thus invalidates any exercise of state power which blocks the flow of commerce at the state border. See, e.g., *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979) [hereinafter *Hughes*] ; *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) ; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) [hereinafter *Pike*].
73. California, in 1911, was the first state to enact a water embargo statute banning outright the export of water to other states (*Act of 3 March 1911*, ch. 104, 1911 Cal. Stat. 271 S.1 (repealed 1917)).
74. *Sporhase, supra*, note 13 at 944.
75. *Neb. Rev. Stat.* s. 46-613.01 (1978) [hereinafter *Nebraska Statute*].
76. *Ibid.*
77. *Sporhase, supra*, note 13 at 957.
78. *Id.* at 954.
79. *Id.* at 954-957.

with interstate commerce and posed a definite barrier between Nebraska and neighbouring states[80].

Groundwater as an Article of Interstate Commerce

The Supreme Court, in deciding for the first time that « water is an article of commerce[81] » expressly overruled the 1908 case *Hudson County Water Co.* v. *McCarter*[82]. The ruling marked a clear break from prior dogmas. The Court rejected the legal fiction of public ownership of a state's natural resources, whether they be minnows, game birds or groundwater[83], and noted that while water, unlike other natural resources, is essential for human survival, it has, however, an overwhelming « interstate dimension »[84]. The Court then observed that the Ogallala Acquifer, from which Sporhase drew his water, underlies six states thus confirming its view that water carries an interstate character which prompts its treatment as an article of commerce[85]. Hence, state regulations affecting movement of water can no longer elude *Commerce Clause* restrictions.

Impermissible Burden on Interstate Commerce

The Supreme Court, having concluded that water is an article of commerce, went on to determine whether the Nebraska statute impermissibly burdened interstate commerce.

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80. *Id.* at 957-958.
81. *Id.* at 954.
82. *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908).
83. *Sporhase, supra*, note 13 at 951.
84. *Id.* at 952-953. In this respect, the Court relied largely on the extensive use of water for agriculture, stating that « over 80% of our water supplies is used for agricultural purposes. The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical [*sic*] example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation » (*Id.* at 953 (footnote omitted)).
85. *Id.* at 953-954. The Court's reasoning logically extends to surface water as well (see *id.* at 954, « [o]ur conclusion that water is an article of commerce »), and has been so interpreted by commentators. See, e.g., M.Z. FERGUSON, « Instream Appropriations and the Dormant Commerce Clause : Conserving Water for the Future » (1987) 75 *Geo. L.J.* 1701, 1702, note 11 ; E.B. SCHWARTZ, « Water as an Article of Commerce : State Embargoes Spring a Leak under Sporhase v. Nebraska » (1985) 12 *B. C. Envt'l Aff. L. Rev.* 103, 129, note 170 ; C.P.A. NELSON, « Sporhase v. Nebraska ex rel. Douglas : A Call for New Approaches to Water Resource Management » (1984) 11 *Hastings Const. L.Q.* 283, 284.

The Court began by looking closely at the legislation without the reciprocity clause. Applying the « Bruce Church test of evenhandedness[86] » to the first three requirements contained in the Nebraska statute[87], the Court first noted that the restrictions on interstate water transfers were exercised equitably[88], and secondly, that the purpose of the statute, « to conserve and preserve diminishing sources of ground water[89] », was « legitimate and highly important[90] ». The Court then advanced four factors which, taken together, supported Nebraska's limited discrimination against non-residents for the purpose of the distribution of its water supplies. First, a state may, by virtue of its police power, regulate the use of water in order to promote the health and safety of its citizens, as opposed to its economy[91]. Secondly, both Congress and the Supreme Court have, over the years, sanctioned state restrictions on water exports through devices such as equitable apportionment decrees and interstate compacts, thus recognizing that state boundaries are relevant to the determination of water rights[92]. Thirdly, Nebraska's claim of ownership, while not rewater from commerce, still justifies a slight preferential treatment in favour of its citizens in the allocation of the resource[93]. Finally, the efforts of Nebraska to ensure the continuing supply of groundwater through the imposition of conservation measures suggest that the resource is a publicly produced and owned good, « in which a State may favor its own citizens in times of shortage[94] ». For all these reasons, the Court concluded that the first three statutory requirements did not impermissibly burden interstate commerce.

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86. In the case *Pike* v. *Bruce Church Inc.* (*Pike, supra*, note 72), the U.S. Supreme Court articulated the general rule for evaluating permissible burdens on interstate commerce : « Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits [...] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities » (*id.* at 142 (citation omitted)).
87. The three statutory conditions required of any request to withdraw groundwater are that it must be : 1) reasonable ; 2) not contrary to the conservation and use of groundwater ; and 3) not otherwise detrimental to the public welfare (see *Nebraska Statute, supra*, note 75).
88. *Sporhase, supra*, note 13 at 956.
89. *Id.* at 954.
90. *Ibid.* (footnote omitted).
91. *Id.* at 956.
92. *Ibid.*
93. *Ibid.*
94. *Id.* at 957.

The Nebraska statute's reciprocity condition did not, however, overcome constitutional examination under the *Commerce Clause*. Indeed, in the view of the Supreme Court, due to the prohibition by the state of Colorado upon the export of its water to Nebraska[95], the reciprocity requirement acted as an explicit ban to water exports in this case[96]. The Court, therefore, subjected the clause to the strict scrutiny test reserved for legislation which is *prima facie* discriminatory[97]. To survive this test, a statute must 1) serve a legitimate local purpose, 2) be narrowly tailored to achieve that aim, and 3) have no nondiscriminatory alternatives available[98]. Applying this standard of review, the Supreme Court found that the reciprocity provision was insufficiently tailored to Nebraska's conservation goals because the clause did not allow the use most conducive to conservation if that use appeared to be in an adjoining state which did not permit its water to be shipped into Nebraska[99]. On the basis of these grounds[100], the Court invalidated the reciprocity provision[101].

1.2.5.3 Impact of the *Sporhase* Decision on Large-Scale Water Diversion Proposals from the Great Lakes Basin

In light of the *Sporhase* decision, it remains questionable whether the Great Lakes states' legislation could validly prevent a diversion proposal of Great Lakes waters intended to serve the needs of some neighbouring water-scarce states. Indeed, this precedent suggests that any unreasonable attempt to keep waters of the Great Lakes Basin for the exclusive use of their landowners would almost certainly be struck down as unconstitutional under the U.S. Constitution. The water-rich Basin states would

95. *Id.* at 957, note 17 (quoting *Colorado Rev. Stat.* s. 37-90-136 (1973) (repealed 1983)).
96. *Id.* at 957.
97. *Ibid.* The Court distinguished those statutes which burden interstate commerce in effect from those which discriminate against non-residents on their face. The latter require strict scrutiny by the Court. See *Hughes, supra*, note 72 at 337.
98. *Hughes, supra*, note 72.
99. *Sporhase, supra*, note 13 at 957-958.
100. The Court also rejected Nebraska's ultimate contention that Congress' general deference to state water laws, as evidenced by the numerous federal statutes approving interstate compacts, indicates Congress' consent to remove state water regulation from *Commerce Clause* review (*Sporhase, supra*, note 13 at 959-960). The Court held that such consent only exists when Congress' « intent and policy » are « expressly stated » (*id.* at 960), which it did not find in this case.
101. Following close on the heels of the *Sporhase* decision, a federal district court declared unconstitutional under the *U.S. Commerce Clause* a New Mexico statute which expressly prohibited export of groundwater from New Mexico for use in another state (see *City of El Paso* v. *Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), on remand, 597 F. Supp. 694 (D.N.M. 1984)).

have a hard time demonstrating that an interbasin transfer could deplete their water supplies to such a degree that their citizens' health and safety would be brought into peril. Consequently, if challenged, outright statutory bans on interstate Great Lakes water diversions would very likely be held to amount to a transgression of the paramount « evenhandedness » principle espoused in *Sporhase*. If and when the bans were repealed, the Great Lakes states would be left scrabbling hastily to draft and implement constitutionally acceptable legislation, such as the state of Nebraska was compelled to do[102].

1.2.6 Sixth Factor: The Canada-United States Free Trade Agreement

The latest event which has spurred considerable debate about the prospect of major water transfers from the Great Lakes Basin is the *Canada-United States Free Trade Agreement* [hereinafter the *FTA* or the *Agreement*][103]. Although the FTA was signed on the 2nd of January 1988, water and free trade were linked in the public's mind long before the final text of the Agreement was released on the 11th of December 1987. Indeed, a flurry of incidents occurring throughout the neoconservative eighties rekindled the idea of water exports from Canada to the United States.

1.2.6.1 Origin of the Controversy Surrounding the Issue of Canadian Water Exports

In early 1985, Prime Minister Brian Mulroney had already set off speculation about the federal position toward water exports when the U.S. business magazine *Fortune* quoted him as replying « why not ? » to the idea of water exports to the United States. The article recalled Donald MacDo-

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102. In ruling on Nebraska's water embargo statute, the U.S. Supreme Court has still left some latitude to the Great Lakes states in managing their waters so that, under appropriate conditions, out-of-state bans might be upheld. In short, when regulating interstate water transfers, each Great Lakes state should be in a position to establish that : 1) the regulation applies evenhandedly to both in-state and out-of-state users, although a limited favouritism toward its citizens might be permissible in times of water shortfalls to ensure their health and welfare, as opposed to the economic benefit of the state itself (*Sporhase, supra*, note 13 at 956) ; and 2) the regulation is narrowly framed so as to fulfill the purpose underlying the statute, in this case, the conservation and maintenance of water supplies for the sake of the Great Lakes state's citizens (*id.* at 957-958).

103. *Canada-United States Free Trade Agreement, supra*, note 2.

nald's suggestion that Canadians make a « leap of faith » into free trade with the United States[104] and reported that :

> Mulroney is so ready for the leap that he is prepared to sell some of his country's abundant fresh water—a shocking thought in Canada, and one most previous Canadian political leaders wouldn't have entertained for a moment [...] But Mulroney seems to invite offers. If a proposition makes economic sense and would help relations between countries, he says, « Why not »[105] ?

After the Report of the Royal Commission on the Economic Union and Development Prospects for Canada was published in August 1985[106], the issue continued to raise growing concerns. Robert Bourassa, at that time the opposition Liberal party leader in the Quebec National Assembly, endorsed the Great Recycling and Northern Development (GRAND) Canal project[107] in a chapter of his book *Power from the North*[108]. His rationale for supporting the engineering studies on the feasibility of the GRAND Canal was that :

> There is little doubt that Quebec and Canada, to their great benefit, could be a source of water for North America in years to come. A sensible, controlled

104. Donald S. MacDonald was the chairperson of the Royal Commission on the Economic Union and Development Prospects for Canada which supported the pursuit of Canada-U.S. free trade in its final report of August 1985

105. R. MCQUEEN, « Canada Warms Up to U.S. Business » *Fortune*, 4 March 1985, p. 120.

106. *Report : Royal Commission on the Economic Union and Development Prospects for Canada*, 3 vols., by D.S. MACDONALD *et al.*, Ottawa, Minister of Supply and Services Canada, 1985 [hereinafter *Royal Commission*].

107. First promoted in 1959 by Thomas W. Kierans, a Canadian engineer, the GRAND Canal proposal is still being actively mooted today. It currently involves the erection of a dyke across James Bay at the mouth of Hudson Bay, with the result of transforming James Bay, a salt water body, into a fresh water reservoir. Water from the reservoir would be pumped and diverted south through a series of canals and then through Ottawa River to the Great Lakes. Water would then be transferred to the United States through the Chicago Diversion. The major purpose of the scheme was to stabilize the level of the Great Lakes. However, it has also been designed as a partial solution to the emerging water scarcity problem faced by the semi-arid agricultural Canadian and U.S. central plains. See generally *The Great Recycling and Northern Development (GRAND) Canal* (Brief No. 003), by T.W. KIERANS, St. John's, Inquiry on Federal Water Policy, 1984 ; *Canadian Interbasin Diversions* (Research Paper No. 6), by J.C. DAY, Ottawa, Inquiry on Federal Water Policy, 1985, pp. 18-19, 21 ; *The Economics of Water Export Policy* (Research Paper No. 7), by A. SCOTT, Ottawa, Inquiry on Federal Water Policy, 1985, pp. 32-33 ; S. REISMAN, « Canada-United States Trade at the Crossroads : Options for Growth » *Can. Bus. Rev.*, vol. 12, no. 3, 1985, pp. 21-23 [hereinafter *Reisman*].

108. R. BOURASSA, *Power from the North*, Scarborough, Prentice-Hall, 1985, pp. 133-157. This book was written to draw attention to his bid to return to power as premier of Quebec, to promote the idea of building the second phase of the James Bay hydroelectric project, and to start promoting the sale of more hydropower to the United States.

> approach to development would greatly benefit all the peoples of this continent and ensure continued cooperation and friendship in the future[109].

Fears escalated significantly when Simon Reisman was hired as Canada's chief trade negotiator for the FTA in November 1985. Prior to this appointment, Reisman was an adviser to and vocal proponent of the GRAND Canal scheme. In an article he wrote following a speech presented to the Ontario Economic Council in April 1985, Reisman suggested that Canada should use its fresh water resources to bargain for a free trade agreement with the United States :

> The urgent need for fresh water in the United States would make that country an eager and receptive partner. Canada would be in a strong bargaining position for obvious reasons.
>
> [...]
>
> [T]his project [GRAND Canal] could provide the key to a free-trade agreement with the United States containing terms and conditions that would meet many Canadian concerns about transition and stability[110].

The juxtaposition of these facts might conceivably have lead one to expect the inclusion of water in the FTA. Yet, such an assumption weakens considerably when confronted with the stand adopted by the Canadian federal government with respect to Canadian large-scale water exports following the release of the document, *Federal Water Policy*[111], in November 1987.

1.2.6.2 The Canadian Federal Government Response

The introduction of *Federal Water Policy* in the House of Commons, on the 5th of November 1987, gave Tom McMillan, then federal Environment Minister, the opportunity to announce the federal government's official position regarding the issue of the FTA and water : « the subject of water has never been negotiated in the free trade talks. The subject of water is not part of the free trade agreement, nor will it be[112]. » Yet, Canada's deputy chief negotiator, Gordon Ritchie, acknowledged that Canada toyed with the idea of seeking an exclusion for water while bargaining with the United States through the 1986-1987 period : « clearly one of the options would have included some specific language[113] ». But he added : « At the

109. *Id.*, p. 155.
110. Reisman, *supra*, note 107 at 23.
111. CANADA, ENVIRONMENT CANADA, *Federal Water Policy*, Ottawa, Environment Canada, 1987.
112. *House of Common Debates* (5 november 1987) at 10783.
113. *House of Common, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-130*, No. 3 (11 July 1988) at 3 :27 [hereinafter *Legislative Committee on Bill C-130*, No. 3].

negotiating table itself [...] that issue was never discussed [...] never proposed, and it was never the subject of negotiation or agreement[114]. »

Notwithstanding its unwavering stand that the FTA does not include fresh water, the federal government, on the 28th of July 1988, amended Bill C-130 — the initial Canadian bill implementing the FTA — to exclude specifically water exports[115]. The rationale for bringing about this amendment was explained by John Crosbie, federal Minister for International Trade at that time, in rather colourful terms : « The amendment is put here because of the puerile and facile and malicious criticism of personages [...] who have spread [...] miasma across the country trying to imply that there is something in this agreement that endangers Canada's water[116]. »

On the 25th of August 1988, in the course of a speech made before the Association of Conservation Authorities of Ontario, the federal Environment Minister felt it necessary to reiterate that :

> [...] because the free trade deal has nothing to do with water in its natural, free-flowing state, the FTA neither compels nor prohibits water exports [...] The Government has already detailed its position in the Federal Water Policy : we oppose any large-scale inter-basin diversion for that purpose [...] [T]he country has been blessed with its share of fresh water — but its share only. We Canadians need to keep every drop we have to meet either current or future needs[117].

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114. *Id.* at 3 :27-3 :28. See also *House of Common Debates* (13 July 1988) at 17498-17499 (per J. McDermid). The following reason was given by Mr. Ritchie for such a decision : « [An exemption for water] was not [included] in [the agreement] because it was judged on technical legal grounds that not only was it not required but that in fact it could be argued that our hand was stronger without it » (*Legislative Committee on Bill C-130, id.* at 3 :35).

115. Bill C-130, *An Act to Implement the Free Trade Agreement Between Canada and the United States of America*, 2d Sess., 33d Parl., 1986-87-88, s. 7 [hereinafter *Bill C-130*]. Bill C-130 died when Prime Minister Mulroney dissolved Parliament on 1 October 1988, for the November national election. After its re-election, the Progressive Conservative party reintroduced the bill in the House of Commons as Bill C-2, *An Act to Implement the Free Trade Agreement Between Canada and the United States of America*, 1st Sess., 34th Parl., 1988 [hereinafter *Bill C-2*]. Bill C-2, which also incorporates the above-mentioned amendment, came into force on 1 January 1989 (*Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65) [hereinafter *Implementation Act*]). For a discussion of the *Implementation Act* and its initial version, *Bill C-130*, in relation to Canadian water resources, see *infra*, Section 2.2.4, « Section 7 of the Implementation Act ».

116. *House of Common, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-130*, No. 20 (2 August 1988) at 20 :17 [hereinafter *Legislative Committee on Bill C-130*, No. 20].

117. T. McMillan, P.C., M.P., *Canadian Water Exports — The Myth and the Facts*, Address to the Association of Conservation Authorities of Ontario, Ottawa, 25 August 1988, pp. 10-11.

Finally, on the 1st of November 1988, Mr. McMillan, in reaction to the release of the book edited by Vancouver-based resource economist Wendy Holm and entitled *Water and Free Trade*[118], issued his last ministerial statement on the point. He denounced the volume as « fiction » and as « an obvious exercise in partisanship »[119]. Noting several outright misrepresentations of facts, he declared : « The thesis that water in its free flowing form is a « good » like others covered by the Free Trade Agreement is utterly preposterous[120]. »

1.2.6.3 Comments

On the basis of the foregoing, should the FTA be viewed as a new menace to the future of the Great Lakes waters ? Does it provide the United States with a powerful tool to compel Canada to sell its water forever ? Owing to its ambiguousness, the political context underlying the issue of the FTA and water is quite clearly of little avail in finding answers to these fundamental and consequential questions. An attempt must be made, however, to clear up the confusion surrounding Canadian water exports and the FTA. Perhaps the best way is to undertake a dispassionate legal analysis of the Agreement. This will therefore be the theme of the next part of this paper.

2. Analysis of the Canada-United States Free Trade Agreement with Respect to Canadian Water Resources

Despite the Canadian federal government's position that « [n]othing in the agreement obligates Canada to sell water to the U.S.[121] », its clamorous opponents insist that water has been made part of the FTA and, furthermore, that the Agreement gives the United States substantial new rights relating to Canada's water that it does not have at present under the *General Agreement on Tariffs and Trade* [hereinafter the *GATT*][122]. Thus,

118. W. HOLM, *supra*, note 69.
119. OFFICE OF THE MINISTER OF THE ENVIRONMENT, *Canada's Water Is Not for Sale*, Ottawa, 1 November 1988, pp. 1-2.
120. *Id.*, p. 2.
121. See J.C. CROSBIE, « There Will Be No Sell-Out of Our Water » *Toronto Star*, 17 June 1988, Section A-22.
122. *General Agreement on Tariffs and Trade*, 30 October 1947, Can. T.S. 1948 No. 31. The GATT is a multilateral treaty which governs trade in goods between Canada, the United States and 106 other countries. It came into effect on a provisional basis on 1 January 1948. The FTA interrelates with and is built upon the framework for the liberalization of world trade provided by the GATT. A current version of the GATT can be found in Y. BERNIER et B. LAPOINTE, *Accord de libre-échange entre le Canada et les États-Unis annoté*, Cowansville, Éditions Yvon Blais, 1990.

as far as Canadian water resources are concerned, the FTA raises two specific issues of equal importance. These are:

— Is water included in the FTA?

— If so, what are the legal consequences of such an inclusion?

Any attempt to answer these two questions must be preceded firstly by an examination of all the provisions involved, either in the FTA, the GATT or the *Canada-United States Free Trade Agreement Implementation Act*[123], secondly, by an understanding of the arguments advanced by the FTA's opponents, and finally, by a critical appraisal of these arguments, in the light of the FTA, the GATT, and the general principles of public international law.

2.1 The Inclusion of Water in the Free Trade Agreement

The response to the preliminary question as to whether water is « in » the deal presupposes the analysis of four key elements, namely:

1. Tariff Item 22.01;
2. The Term « Goods »;
3. Chapter Seven (Agriculture); and
4. Exceptions for Trade in Goods.

2.1.1 Tariff Item 22.01

Tariff Heading 22.01 appears in both the Canadian and U.S. tariff schedules annexed to the FTA[124] and in the GATT schedules as well. The heading states:

123. *Implementation Act*, *supra*, note 115. For a discussion of the *Implementation Act*, see *infra*, Section 2.2.4, « Section 7 of the Implementation Act ».

124. For the schedule of Canada, see CANADA, REVENUE CANADA CUSTOMS AND EXCISE, *Customs Tariff*, Ottawa, Minister of Supply and Services, 1 January 1992 [hereinafter *The Canadian Customs Tariff*]; for the United States schedule, see UNITED STATES AND INTERNATIONAL TRADE COMMISSION, *Harmonized Tariff Schedule of the United States (1992) — USITC Publication 2449*, Washington, D.C., U.S. Government Printing Office, 1992 [hereinafter *The Harmonized Tariff Schedule of the United States*].

Item	Article Description	Base Rate	Free Trade Tariff (01-01-1992)	Staging Category[125]
22.01	Waters, including natural or artificial mineral water and aerated waters, not containing added sugar or other sweetening matter nor flavoured ; ice and snow.			
2201.10.00	Mineral waters and aerated waters	0.4c/liter (U.S.) Free (Canada)	Free (U.S.) Free (Canada)	C (U.S.) D (Canada)
2201.90.00	Other	Free (U.S.) 10.2% (Canada)	Free (U.S.) 6.1% (Canada)	D (U.S.) C (Canada)

Each tariff schedule is based on the *Harmonized Commodity Description and Coding System* [hereinafter the *Harmonized System*][126]. Tariff Item 22.01 is found in Chapter 22 of the *Harmonized System*. The title of Chapter 22 reads « Beverages, Spirits and Vinegar ». Chapter 22 is included in Section IV of the *Harmonized System*. Section IV is entitled « Prepared Foodstuffs ; Beverages, Spirits and Vinegar ; Tobacco and Manufactured Tobacco Substitutes ». The General Rules governing the interpretation of the *Harmonized System* state : « Rule (1) : The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only ; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes[127] ».

125. FTA 401.2(c) provides that duties on goods designated as part of « category C » will be removed in ten equal annual stages commencing on 1 January 1989, and such goods will be completely free of duty, effective on 1 January 1998. FTA 401.4 indicates that goods designated in Annex 402.1 as « category D » are goods which already enjoy duty-free treatment.

126. The *Harmonized System* is a method for import classification which has been established under the *International Convention on the Harmonized Commodity Description and Coding Systems*, 14 June 1983, Can. T.S. 1988 No. 38. Many countries, including Canada and the United States, became parties to the Convention which was signed in Brussels on 14 June 1983. The *Harmonized System* came into force in Canada on 1 January 1988 (*Customs Tariff*, R.S.C. (1985), c. 41 (3rd Supp.)), and in the United States on 1 January 1989 (19 U.S.C. s. 3004(b) (1992)).

127. CUSTOMS CO-OPERATION COUNCIL, *Harmonized Commodity Description and Coding System : Explanatory Notes*, 1st ed., vol. 1, Brussels, 1986, p. 1 [hereinafter *Harmonized System Explanatory Notes*].

Accordingly, neither the title of Chapter 22 nor the title of Section IV can be used to determine the tariff classification of goods pertaining to this chapter. Only the particular words of Tariff Item 22.01 govern its interpretation[128]. In this regard, the *Harmonized System Explanatory Notes* to Tariff Item 22.01 provide: « This heading covers: (A) Ordinary natural water of all kinds (other than sea water [...])[129]. »

The opponents to the FTA affirm that Tariff Item 22.01 constitutes explicit evidence of the inclusion of water in its natural state in the Agreement[130]. Their assertion is based on the three following grounds: 1) Under Item 22.01, the only type of water excluded is water that is sweetened or flavoured; 2) The term « water » includes all natural water other than sea water, according to the *Harmonized System Explanatory Notes*; and 3) The chapter heading in the tariff does not limit the scope of the wording of the Item itself. Hence, all natural water — even water in the form of ice and snow — irrespective of how it is packaged and transported, is subject to all the provisions of the deal.

The conclusion reached by the opponents — that any water, other than sea water, would be classifiable under Tariff Item 22.01 — appears, at first glance, inescapable. Indeed, although a review of the various Tariff Items in Chapter 22 of the *Harmonized System* and the *Explanatory Notes* pertaining thereto indicates that Chapter 22 is primarily addressed to beverages, nothing in the wording of Tariff Item 22.01 suggests that the word « waters » is restricted to waters used as a beverage or waters which are not of large-scale quantities such as would be required in the context of a diversion from the Great Lakes Basin to the U.S. West. Nevertheless, an analysis of the term « goods » under both the FTA and the GATT undermines their conclusion.

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128. See J. HIRSCH, « Harmonized System Overview » in A. DE LOTBINIÈRE PANET (ed.), *National Trade and Tariff Service*, Toronto, Butterworths, 1990, p. H1.1 at H1.7-H1.8. The words of other Tariff Items in Chapter 22 can also be used as an aid to interpret Tariff Item 22.01 in context.

129. *Harmonized System Explanatory Notes*, *supra*, note 127, p. 163.

130. See M. CLARK and D. GAMBLE, « Water Is in the Deal » in W. HOLM (ed.), *supra*, note 69, p. 2 at 4 [hereinafter *Water Is in the Deal*]. The gist of the FTA opponents' contention respecting Tariff Item 22.01 has been generally put forward by Don Gamble, Executive Director of the Rawson Academy of Aquatic Science and by Mel Clark, former Canada's deputy chief negotiator to the GATT Tokyo Round.

2.1.2 The Term « Goods »

FTA 201.1 states : « For purposes of this Agreement, unless otherwise specified : [...] goods of a Party means domestic products as these are understood in the General Agreement on Tariffs and Trade ».

According to Don Gamble and Mel Clark, the wording of FTA 201.1, as interpreted under the GATT, clearly endorses their position that the deal encompasses all natural water : « Tariffs covering water have been included for many years in the schedules annexed to GATT [...] GATT has adopted the Harmonized System including tariff heading 22.01, which includes all natural water. It is beyond reasonable doubt that GATT understands water to be a « good »[131]. »

The accuracy of this opponents' assessment hinges ultimately on the meaning of the critical words « domestic products as these are understood in the General Agreement on Tariffs and Trade », contained in FTA 201.1. The various provisions of the GATT are for the most part expressed in terms of « products ». However, neither the GATT nor the case-law has set forth any precise definition of the word. Though it was once suggested that the method of tariff classification could be used for defining the term « products »[132], this proposition was discarded as one can observe from the cases and the text-writers[133]. Given the absence in the GATT of a definition of the word « product », it must therefore be construed in conformity with the rules of public international law concerning the interpretation of treaties[134].

Two relatively short provisions of the *Vienna Convention of the Law of Treaties, 1969*[135] provide for the basic principles of treaty interpreta-

131. *Id.* at 5.

132. GATT, *Analytical Index*, 3d rev., Geneva, GATT, 1970, p. 4 [hereinafter *Analytical Index*, 3d rev.].

133. GATT, 28th supp. B.I.S.D. (1981) 102 at 112 ; GATT, 25th supp. B.I.S.D. (1978) 49 at 63 ; GATT, 1st supp. B.I.S.D. (1952) 53 at 57 ; GATT, vol. II. B.I.S.D. (1950) 188 at 191. See also J.H. JACKSON, *World Trade and the Law of GATT*, Indianapolis, Bobbs-Merrill, 1969, pp. 259-264.

134. In Canada, treaty interpretation is governed by public international law principles rather than Canadian domestic law rules of statutory interpretation. See *Re Regina and Palacios* (1984) 10 C.C.C. (3d) 431, 440 (Ont. C.A.) ; D.P. O'CONNELL, *International Law*, 2d ed., vol. 1, London, Stevens and Sons, 1970, p. 257 [hereinafter *O'Connell*].

135. *Vienna Convention of the Law of Treaties*, U.N. Doc. A/Conf. — 39/27 (1969), Can. T.S. 1980 No. 37, reprinted in 8 I.L.M. 679 [hereinafter *Vienna Convention*]. Instrument of accession deposited by Canada on 14 October 1970, pursuant to Order in Council, P.C. 1979-1339. Entered into force on 27 January 1980. The *Vienna Convention* codifies most pre-existing customary law governing treaties between states and, insofar as this codification has been successful, it supersedes customary law.

tion[136]. In this respect, the golden rule is embodied in Article 31.1 of the *Vienna Convention*. It reads : « A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. »

Hence, the construction of the word « product » is governed primarily by its ordinary meaning. The *Oxford English Dictionary* defines « produce » as « to bring (a thing) into existence from its raw materials or elements, or as the result of a process[137] ». Thus, for a good to become a product, something must have been done to it. To be affected by the provisions of the FTA pertaining to goods, water must accordingly be a « product ». Natural water can become a « product » only by being collected, stored, bottled or otherwise packaged, and so on. Conversely, water in a natural river, lake or in the ground, has not been « produced » within the literal meaning of the word and therefore, does not constitute a « product » under the GATT nor a « good » for the purpose of FTA 201.1. Consequently, as it was stressed by Jon Johnson : « If natural « unproduced » water is not a « good » as defined in the FTA, then no rights or obligations can have been conferred or imposed by the FTA, regardless of what extended obligations one chooses to read into its provisions[138]. »

Moreover, this interpretation is clearly confirmed when considered in the context of the GATT as a whole. In this regard, while water as a traded beverage has long been covered by international trading rules — including those stipulated in the GATT and to which Canada itself subscribes — water in its natural free-flowing state has never been contemplated and there is no indication at the present time that it ever will. Frank Stone, a senior research associate for the Institute for Research on Public Policy[139], upheld this position before the Legislative Committee set up to examine Bill C-130, the initial Canadian bill implementing the FTA[140]. He stated :

> Trade in water as a beverage has been covered by the GATT for forty years, and has been subject to its rules about customs duties, national treatment and import and export controls, with exceptions permitted for conservation and a few other reasons. The Free Trade Agreement does not change Canada's obligations under

136. *Id.*, art. 31-32.

137. *The Oxford English Dictionary*, rev. ed., Oxford, Clarendon Press, 1961, *s.v.* « produce ».

138. Letter from J.R. Johnson to M. Perley (31 August 1988) Toronto at 6. Mr. Johnson participated in the drafting of the FTA provisions respecting automotive goods.

139. As Minister and Deputy Head of the Mission in Geneva, during 1973-1977, Frank Stone represented Canada's interests in GATT and in other international bodies concerned with economic and trade policy.

140. *Bill C-130*, *supra*, note 115. For a discussion of *Bill C-130* with respect to the Canadian water export issue, see *infra*, Section 2.2.4, « Section 7 of the Implementation Act ».

> the GATT [...] except that both Canada and the United States have agreed to remove their duties on cross-border trade in water as a beverage. *Water diversions have never been discussed in the GATT, and any suggestion that GATT covers water diversions or inter-basin transfers would be hooted down in Geneva by the GATT member countries* [emphasis added][141].

Hence, to the extent that water is envisaged as a commercial product in bottled or containerized form, the opponents' assertion that water is included in the GATT is well-founded. This is why Tariff Item 22.01 of the *Harmonized System* attached to the FTA refers to water under the « Beverages, Spirits and Vinegar » chapter. However, insofar as water in its natural state is concerned, their argument is undoubtedly flawed. Large-scale sales based on diversions from one river basin to another stand outside the purview of both the GATT and the FTA.

2.1.3 Chapter Seven (Agriculture)

« Agricultural goods » are defined in FTA 711 by reference to specific chapter numbers and specific tariff headings of the *Harmonized System*. The definition covers a wide array of products which are manufactured or processed from primary agricultural goods. FTA 711 provides : « For purposes of this Chapter : agricultural goods means [...] all goods classified within the following specific tariff headings of the Harmonized System : [...] 22.01 [...]. »

Opponents claim that FTA 711 gives clear indication of the explicit inclusion of water in its natural state in the deal[142]. The evidence stems from the fact that the Article describes the goods classified within Tariff Item 22.01 — any water other than sea water — as agricultural goods, for the purpose of Chapter Seven.

As one can see, this contention rests on the premise that Tariff Item 22.01 covers not only water as a beverage but also fresh water. Nonetheless, as discussed earlier[143], this postulation is partly mistaken since the type of water contemplated under Tariff Item 22.01 is strictly limited to water as a normally-traded beverage. Moreover, while the mention of Tariff Item 22.01 in the definition of « agricultural goods » in FTA 711 seems rather questionable, such mention, however, has no bear-

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141. F. STONE, « Our Water Is for Sale — In Bottles », *House of Common, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-130*, No. 10 (19 July 1988), Appendix « C-130/7 » at 10A :7-10A :8 [hereinafter *Legislative Committee on Bill C-130*, No. 10]. This view was also endorsed by Canada's deputy trade negotiator Gordon Ritchie, under questioning before the same Committee (see *Legislative Committee on Bill C-130*, No. 3, *supra*, note 113 at 3 :27).

142. See *Water Is in the Deal*, *supra*, note 130 at 5.

143. See *supra*, Section 2.1.2, « The Term « Goods » ».

ing on Canadian water exports. On the one hand, the definition of « agricultural goods » given in FTA 711 is solely applicable in the context of Chapter Seven of the Agreement, while on the other hand, a thorough reading of this chapter reveals that the only provision affecting exports is contained in FTA 701.2. This Article reads : « Neither Party shall introduce or maintain any export subsidy on any agricultural goods originating in, or shipped from, its territory that are exported directly or indirectly to the territory of the other Party. »

In light of the foregoing, can one still sustain successfully that FTA 711 and 701.2 could be invoked to compel Canada to export its water ? The answer to this question seems quite obvious, taking into account the fact that FTA 701.2 aims strictly at the elimination of export subsidies on trade in agricultural goods between Canada and the United States, and that no further purpose can reasonably be drawn from its wording[144].

2.1.4 Exceptions for Trade in Goods

Chapter Twelve of the deal « grandfathers[145] » some non-tariff barriers. In this respect, FTA 1203 excepts from Chapters Three to Twelve of the FTA controls imposed by the Parties on the export of logs of all species as well as controls on the export of unprocessed fish pursuant to legislation in New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Quebec. In a similar manner, FTA 1204 retains existing practices relating to the internal sale and distribution of beer, subject to each Party's GATT rights (FTA 1205).

FTA's critics contend that Chapter Twelve of the FTA, in specifically exempting from the purview of the deal logs, fish and beer, hints that water is covered by the Agreement[146]. Where the FTA intends to exclude a particular good from its scope, it says so, as FTA 1203 and 1204 illustrate.

Such a proposition — that the inclusion of water in the Agreement can be inferred from FTA 1203 and 1204 — appears unfounded and misguided, inasmuch as it ignores the reason why logs, fish and beer were explicitly

144. For a summary of the implications of Chapter Seven of the FTA for Canadian water exports, see J.R. JOHNSON, *Water and the Free Trade Agreement*, Toronto, 17 October 1988, p. 2 [unpublished].

145. A « grandfather clause » refers to any clause in an international agreement which states that some existing legislation, programs, or policies are exempted from the application of the agreement, in spite of their inconsistency with its provisions.

146. See CANADIAN ENVIRONMENTAL LAW ASSOCIATION, *An Environmental Guide to the Canada-U.S. Trade Deal*, Toronto, 1988, c. 12 [hereinafter *An Environmental Guide to the Canada-U.S. Trade Deal*].

exempted by the Parties. In this regard, it is worth underscoring the comment made by Frank Stone :

> Comparisons with the exclusion from the Trade Agreement of raw logs, beer [...] are misplaced. Unlike water diversions, trade in logs, beer [...] has been the subject of lively international trade debates for many years ; and these subjects, unlike water diversions, were very much on and off the table during the free trade negotiations[147].

Thus, the purpose of FTA 1203 and 1204 is to provide that existing measures pertaining to logs, fish and beer are maintained as such, regardless of any discrepancy with the FTA's provisions. These two Articles were therefore included in the deal as a response to pre-existing situations. However, as far as Canadian water exports are concerned, there are currently not, nor have there ever been, any large-scale exports of water by diversion from Canada to the United States. Hence, the « pre-existing » element underlying FTA 1203 and 1204 is not present. Consequently, there is little doubt that no evidence of the inclusion of water in the Agreement may be derived from FTA 1203 and 1204. These Articles deal with a context utterly different from the one prevailing in respect of Canadian water exports.

2.1.5 Summary

The provisions of the FTA cannot be interpreted in a vacuum. It is indisputable that water as a beverage is addressed in the FTA. In this respect, the Agreement merely removes, over a 10-year period, the U.S. customs duty of $0.004 per liter ($0.015/gallon) on Canadian beverage water[148] and the 10.2 per cent Canadian duty on imports of U.S. water[149]. However, while literal construction of Tariff Item 22.01 could *a priori* support the contention that all natural water — water that sits in a basin or flows in a river — is covered under the deal, such a contention fails when considered in the light of the relevant provisions of the FTA, the GATT, and the public international law principles of treaty interpretation. Indeed, this type of water has never been discussed under the GATT nor should it be under the FTA. Nothing in the GATT nor the FTA can allow Americans to buy something that is not for sale.

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147. *Legislative Committee on Bill C-130*, No. 10, *supra*, note 141 at 10A:9. See also *Legislative Committee on Bill C-130*, No. 3, *supra*, note 113 at 3:29 (per Canada's deputy trade negotiator G. Ritchie).
148. *The Harmonized Tariff Schedule of the United States*, *supra*, note 124, Tariff Item 2201.10.00.
149. *The Canadian Customs Tariff*, *supra*, note 124, Tariff Item 2201.90.00.

2.2 Consequences of the Inclusion of Water in the Agreement

Given the absence of a consensus as to whether water exports in the form of diversions are included in the FTA, it becomes essential to appraise the potential impact of the Agreement on this type of exports, in the case that these would somehow be covered by the deal. One crucial question arises : does the FTA give the United States substantial new privileges relating to Canadian water while significantly reducing Canada's freedom to act to meet its own water needs ? The response to this query depends ultimately on the analysis of a number of provisions contained either in the FTA or the Canadian legislation implementing the Agreement. These provisions are :

1. National Treatment Provisions ;
2. Export Provisions ;
3. Nullification and Impairment Provisions ; and
4. Section 7 of the *Implementation Act*.

2.2.1 National Treatment Provisions

One of the cornerstones of the GATT, the principle of national treatment, has become the fundamental guiding rule of the FTA. The essence of national treatment is that subject to the payment of duty on importation, each contracting party must treat the goods from any other contracting party in a manner no less favourable than similar goods of domestic origin. Article III of the GATT sets out the national treatment principle but limits its application to internal taxes, laws, regulations and other charges on imported products only. Thus, the United States is not endowed with any GATT national treatment rights with respect to Canada's water. Under the FTA, the national treatment principle is affirmed explicitly in Articles 105, 501, 502, 1402 and 1602[150]. FTA 105 states : « Each Party shall, to the extent provided in this Agreement, accord national treatment with respect to investment and to trade in goods and services ». The national treatment provisions of the FTA in respect of goods are those contained in Articles 501 and 502. FTA 501.1 does nothing more than incorporate by reference the GATT national treatment principle of Article III : « Each Party shall accord national treatment to the goods of the other Party in accordance with the existing provisions of Article III of the [...] GATT [...] including its interpretative notes ».

150. FTA 1402 and FTA 1602 deal strictly with services and investment and are therefore irrelevant to this discussion.

FTA 502 enlarges the scope of FTA 501 by expressly making the GATT national treatment obligation applicable to measures adopted by provinces or states[151]. This means that neither a province nor a state can discriminate against imported products by means of standards established within its jurisdiction.

According to critics, the deal gives the United States significant national treatment rights in relation to Canadian water that it does not now have under the GATT. This is evidenced in two ways. First of all, the expression « to the extent provided in this Agreement », contained in FTA 105 would mean that Canada is required to treat the United States as favourably as itself in the allocation of water; thus, this would oblige Canada to export water to the United States even in times of drought or other significant shortages:

> Canadian governments — provincial as well as federal — are obligated to accord Americans treatment no less favourable than that accorded to Canadians in respect of all laws, regulations and requirements affecting the export of water [...] Americans will have the same standing in Canadian law as Canadians[152].

Secondly, since the FTA does not state that national treatment obligations must be explicitly provided for in the text of the deal, it could therefore be argued that the Agreement implicitly confers expanded national treatment rights on the United States over Canadian water[153].

The opponents' construction of the national treatment provisions contained in the FTA appears groundless and weak in the light of the general rules of public international law respecting treaty interpretation. To begin with, FTA 105 does not create as such any national treatment obligation. The critical words in this Article are — as noted by the opponents — « to the extent provided in this Agreement ». Let us subscribe for a moment to the proposition that these words are ambiguous[154]. It becomes

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151. FTA 502 reads: « The provisions of this Chapter regarding the treatment of like, directly competitive or substitutable goods shall mean, with respect to a province or state, treatment no less favourable than the most favourable treatment accorded by such province or state to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part. »

152. *Water Is in the Deal, supra*, note 130 at 7. See also *An Environmental Guide to the Canada-U.S. Trade Deal, supra*, note 146, c. 1.

153. *Water Is the Deal, supra*, note 152.

154. In public international law, there is a preliminary principle that where a treaty clause is clear and unambiguous, it does not require to be interpreted. This is known as the « Vattel Rule ». See L. OPPENHEIM, *International Law: A Treatise*, 8th ed., vol. 1, *Peace*, London, Longmans, 1967, p. 952, n. 1 [hereinafter *Oppenheim*]; C.H. ROUSSEAU, *Droit international public: introduction et sources*, vol. 1, Paris, Sirey, 1970, p. 269 [hereinafter *Rousseau*]; *O'Connell, supra*, note 134, p. 253.

necessary, therefore, to resort to the public international law principles of treaty interpretation to ascertain their meaning[155]. Apart from Articles 31 and 32 of the *Vienna Convention*[156], the rules of customary international law remain applicable as a means of interpreting treaties, to the extent of their compatibility with these Articles[157]. One of these customary rules is particularly relevant to the present case. It was described as follows by Professor Charles Rousseau :

> Recours au traité dans son ensemble. — Lorsqu'un traité institue un régime juridique déterminé, la jurisprudence internationale tend à interpréter la disposition qui lui est soumise en tenant compte de la place qu'occupe cette disposition dans un système formant un tout.
>
> [...]
>
> Cette méthode [...] revient à interpréter une disposition [...] par référence à d'autres dispositions du même traité[158].

The legal effect of the expression « to the extent provided in this Agreement » becomes quite clear on the basis of the foregoing rule : FTA 105 has no force by itself. One must look at the provisions contained in the remainder of the FTA to determine which national treatment obligations are set forth pertaining to goods. In this respect, the only explicit provisions in the FTA which address and define exactly what « national treatment » means respecting goods are FTA 501 and 502.

Likewise, any concern that the FTA may contain an implicit national treatment provision is quickly dispelled by the wording of the Agreement itself, when considered as a whole. Looked at in one way, it may be suggested that the FTA does extend the national treatment principle between Canada and the United States beyond the GATT rule stated in Article III. In this respect, the tariff elimination in FTA 401, the prohibition

155. For a discussion of the applicability of the rules of public international law with respect to treaty interpretation in Canada, see *supra*, note 134.

156. See *supra*, notes 135-136 and accompanying text.

157. Article 31.3(c) of the *Vienna Convention* states that relevant rules of international law may be resorted to in treaty interpretation. See *O'Connell*, *supra*, note 134, p. 261.

158. [Free translation] « Recourse to the treaty as a whole. When a treaty establishes a given legal regime, the international courts tend to interpret the provision in question by taking into account its position within the system as a whole [...] Hence, under this method [...] the provision concerned is interpreted with reference to other provisions of the same treaty » : Rousseau, *supra*, note 154, pp. 285-286. See also *Oppenheim*, *supra*, note 154, p. 953 ; *O'Connell*, *supra*, note 157, p. 256 ; *Customs Regime Between Germany and Austria* (1931), P.C.I.J., Ser. A/B, No. 41 at 60 ; *Guillemot-Jacquemin Claim*, (1951) 18 I.L.R. 403 at 404 ; *Re Interpretation of Article 78, Paragraph 7, of the Peace Treaty with Italy (1947)*, (1957) 24 I.L.R. 602 at 609-610.

of export taxes in FTA 408[159], the conditions imposed by FTA 409[160] and the nullification and impairment provisions contained in FTA 2011[161] may be viewed as an extension of the GATT national treatment concept. However, each of these « extensions » is explicitly defined and precisely circumscribed. There is nothing in any of these Articles from which a further extension of the national treatment principle may be inferred.

On top of this, such a construction would most likely be struck down under the following rule of customary international law (occasionally referred to as the *in dubio mitius* principle) :

> A treaty will not be interpreted as imposing an unequal burden on one party unless this intention is quite clear on its face. Conversely, when a provision is ambiguous that interpretation should be given which confers the minimum of benefit on the favoured party. Otherwise the unfavoured party would be, to the excess of the benefit, restricted in its sovereignty[162].

Hence, no matter how appealing and rational the « expanded national treatment » argument presented by the opponents may appear at first sight, it does not take into account the rules of interpretation potentially applicable in the circumstances.

2.2.2 Export Provisions

2.2.2.1 Preliminary

The only provisions of the FTA which could conceivably affect measures to prohibit or restrict exports of water are contained in FTA 407, 408,

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159. For a detailed discussion of FTA 408, see *infra*, Section 2.2.2.2, « Export Taxes ».
160. For a detailed discussion of FTA 409, see *infra*, Section 2.2.2.3, « Other Export Measures ».
161. For a detailed discussion of FTA 2011, see *infra*, Section 2.2.3, « Nullification and Impairment Provisions ».
162. *O'Connell*, *supra*, note 134, pp. 256-257 (footnotes omitted). See also *Oppenheim*, *supra*, note 154, p. 953 ; *Rousseau*, *supra*, note 154, pp. 297-298 ; I. BROWNLIE, *Principles of Public International Law*, 3d ed., Oxford, Clarendon Press, 1979, p. 628 ; *Mosul Boundary Case* (1925), P.C.I.J., Ser. B, No. 12 at 25 ; *The Jurisdiction of the International Commission of the River Oder* (1929), P.C.I.J., Ser. A, No. 23 at 26 ; *Kronprins Gustaf Adolf*, (1932) 2 U.N.R.I.A.A. 1239 at 1254 ; *Radio Corporation of America Case*, (1935) 3 U.N.R.I.A.A. 1621 at 1627. In the case of a U.S. proposal to divert water from the Great Lakes Basin to replenish supplies in the American West, the impending U.S. water crisis would have to be balanced against Canada's dependence on the Great Lakes. While diverting water from the Basin might be the most suitable solution for the United States to alleviate western water shortages, other far less environmentally disruptive and economically excessive alternatives would clearly be available. As a result, the convenience to the United States would likely not outweigh the detriment to Canada under the *in dubio mitius* rule.

and 409. Under FTA 407.1[163], both Canada and the United States have agreed to establish or maintain only import or export quantitative restrictions [hereinafter *QRs*][164] which are in accordance with the GATT. Thus, an understanding of the FTA export rules requires an analysis of two of the GATT provisions, that is, Articles XI and XX.

Article XI of the GATT prohibits a contracting party from instituting or maintaining QRs — other than duties, taxes or other charges — on imports or exports of products to other contracting parties unless such restriction is specifically exempted in other sections of the GATT. Insofar as the issue of water exports is addressed, the most relevant exceptions are contained in both Articles XI and XX. These are:

1. Restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party: GATT, Article XI.2(a)[165];
2. Restrictions necessary to protect human, animal or plant life or health: GATT, Article XX(b);
3. Restrictions necessary for the conservation of exhaustible natural resources: GATT, Article XX(g);
4. Restrictions on the export of domestic materials necessary to a domestic industry, when the price of the materials is held below the world price, as part of a government stabilization plan: GATT, Article XX(i); and

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163. FTA 407.1 reads: « Subject to the further rights and obligations of this Agreement, the Parties affirm their respective rights and obligations under the [...] GATT [...] with respect to prohibitions or restrictions on bilateral trade in goods. »
164. The term « quantitative restriction » refers to any explicit limit or quota — usually measured by volume but sometimes by value — imposed on the amount of particular commodities which can be imported or exported during a specific time period.
165. GATT, Article XI in part states:
    1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
    2. The provisions of paragraph 1 of this Article shall not extend to the following:
    (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party [...].

5. Restrictions essential to relieve critical shortages, provided that such restrictions ensure an equitable share of the international supply of such products: GATT, Article XX(j)[166].

For its part, FTA 1201 provides that, subject to FTA 409, Article XX of the GATT is incorporated into and made a part of Chapters Three to Twelve of the FTA[167]. This means that the exceptions contained in Article XX of the GATT become provisions of the FTA itself for all purposes, including dispute settlement[168].

2.2.2.2 Export Taxes

Under Article XI of the GATT, a contracting party maintains its right to levy taxes, duties or other charges on the exportation of any product destined for other contracting parties, providing that the tax, duty or other

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166. GATT, Article XX in part reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

[...]

(b) necessary to protect human, animal or plant life or health;

[...]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

[...]

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

167. FTA 1201 states: « Subject to the provisions of Articles 409 and 904, the provisions of Article XX of the [...] GATT [...] are incorporated into and made a part of this Part of this Agreement. »

168. See J.R. JOHNSON and J.S. SCHACHTER, *The Free Trade Agreement: A Comprehensive Guide*, Aurora, Canada Law Book, 1988, p. 7.

charge is levied on a « most-favoured-nation » basis[169]. Under FTA 408, however, export taxes which would make the price of any exported good differ from the one charged domestically are no longer allowed. FTA 408 states : « Neither Party shall maintain or introduce any tax, duty or charge on the export of any good to the territory of the other Party, unless such tax, duty, or charge is also maintained or introduced on such good when destined for domestic consumption. »

According to critics, the juxtaposition of Article XI of the GATT and FTA 408 substantially curtails Canada's ability to veto exports of water to the United States. They assert that :

> An export tax is the only trade measure that Canada can legally use under GATT to permanently embargo exports of water [...] GATT provisions that permit export restrictions are hedged with conditions that rule out their use to permanently embargo exports of water.
>
> Under the free trade agreement, Canada has, for all practical purposes, relinquished its right to levy an export tax on water[170].

This ground leads them to affirm that Canada, in surrendering its GATT right to levy export taxes on water, will likely sustain material adverse effects, such as the one illustrated as follows :

> Assume a provincial government diverts water within its boundaries for sale in Canada and export to the United States or privatizes water rights to achieve similar results. In such circumstances, would a federal government levy an export tax on Canadian users of the diverted water as well as American users if it wanted to embargo exports ? If not, what article of the free trade agreement would the government use to provide legal cover for an embargo[171] ?

The concerns expressed by the FTA opponents in relation to Article XI of the GATT and FTA 408, although not totally baseless, necessitate some rectifications. Indeed, it is undeniable that FTA 408 goes far beyond the GATT obligations set forth in Article XI of the GATT. The condition underlying the imposition of an export tax under FTA 408 — namely, the levy of the same tax on domestic consumers — is unlikely to induce Canada to use this tool as a way to impose restrictions on water exports. Nevertheless, export taxes postulate the existence of export. As discussed earlier[172], Canada has never committed itself to sell its water to the United States.

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169. Article I of the GATT establishes the « most-favoured-nation » principle as the basic rule governing trade among the signatories. An advantage, favour, privilege or immunity granted by one contracting party in respect of a product originating in or destined for any other contracting party must be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
170. *Water Is in the Deal, supra*, note 130 at 5.
171. *Id.* at 6.
172. See *supra*, Section 2.1, « The Inclusion of Water in the FTA ».

The American demand for Canadian water is, so far at least, a made-in-Canada controversy. Thus, the limitation contained in FTA 408 has no bearing on Canada's ability to prohibit or restrict exports of water, as long as it maintains the *status quo*. Moreover, even in the event that a province or a private consortium, as a grantee of provincial water rights, attempted to divert huge amounts of water located within provincial boundaries to the United States, the federal government would still be constitutionally empowered to enjoin the realization of such a water export scheme[173].

Yet, despite Parliament's authority over international sales of water, one question remains unsolved : could this authority be exercised without reneging on treaty commitments embodied in the FTA ? In light of certain provisions of the GATT, it is submitted that the federal government could proscribe large-scale water exports initiated by either a provincial government or a private group without violating any FTA obligations. Indeed, in spite of the opponents' contention to the contrary, the imposition of an export tax does not constitute the sole legal means that Canada could use to ban permanently water exports. It could still rely on at least two GATT exceptions to justify an embargo on water exports, namely, Articles XX(b) and XX(g). As we will see in the next section, both provisions preserve Canada's ability to manage its water resources.

2.2.2.3 Other Export Measures

FTA 409.1 appears potentially to be the most pernicious provision of the FTA. It is the only Article which could adversely affect Canada's authority over water exports. FTA 409.1 singles out four GATT exceptions — Articles XI.2(a), XX(g), XX(i) and XX(j) — and imposes three conditions if any one of these exceptions is relied upon by Canada or the United States to justify an export restriction which would otherwise be

173. If the federal government tried to halt such an action undertaken by either a province or a private coalition — using, for example, its authority over international trade (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formely *British North America Act, 1867*), s. 91(2)) — it could do so constitutionally, as a matter of domestic law. See generally C.D. HUNT, « Jurisdiction over Trade in Natural Resources in Canada » in J.O. SAUNDERS (ed.), *Trading Canada's Natural Resources*, Calgary, Carswell, 1987, p. 253 at 253-279 ; J.O. SAUNDERS, « The Regulation of Water Exports » in J.O. SAUNDERS (ed.), *id.*, p. 325 at 332-334 ; D. GIBSON, « The Constitutional Context of Canadian Water Planning » (1969) 7 *Alta L. Rev.* 71 ; *The Federal Role in Water Management* (Research Paper No. 15), by J.S. MACTAVISH, Ottawa, Inquiry on Federal Water Policy, 1985, pp. 4-14.

prohibited under Article XI of the GATT. The three conditions prescribed by FTA 409.1 are the following:

1. The restriction must not reduce the proportion of the total supply of the restricted good available to the other Party as compared to the proportion for the previous 36-month period: FTA 409.1(a);
2. The exporting Party must not impose a higher price for exports to the other Party than the domestic price: FTA 409.1(b); and
3. Normal channels of supply must not be disrupted: FTA 409.1(c).

The proportional sharing requirement contained in FTA 409.1(a) imposes unquestionably an additional constraint on the QR rule set forth in Article XI of the GATT. Does this mean that FTA 409.1 eliminates *in toto* Canada's ability to place an embargo on water exports to the United States? Again, there appears to be no clear-cut answer to this question.

According to some, Canada has, by virtue of FTA 409.1, abdicated its sovereign authority over its water resources[174]. The Article, in barring Canada from imposing any restrictions on water exports, guarantees the United States access to a proportionate share of all Canadian water in perpetuity, no matter how severe shortages may become and regardless of the environmental costs of maintaining such exports. The irreversible nature of such large-scale exports of water could therefore increase the dependance of Canada on the United States in the long run: « Water flowing across the border [...] could turn out to constitute strong and costly chains binding Canada even more tightly to the destiny and decisions of it's [*sic*] great southern neighbour. That destiny may be great, and the decisions wise. But they would not be Canadian[175]. »

This argument is rather emotional and excessive, to say the least. Quite clearly, FTA 409.1 extends Canada's existing international obligations enunciated in Article XI of the GATT. However, neither this Article nor any other provision of the FTA obliges Canada to export its water to the United States. FTA 409.1 only narrows the circumstances in which export restrictions could otherwise be imposed by Canada under the GATT.

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174. See CANADIAN ENVIRONMENTAL LAW ASSOCIATION, *Selling Canada's Environment Short: The Environmental Case Against the Trade Deal*, Toronto, 1988, p. 6 [hereinafter *Selling Canada's Environment Short*]; A. JACKSON, « The Trade Deal and the Resource Sector » in D. CAMERON (ed.), *The Free Trade Deal*, Toronto, J. Lorimer, 1988, p. 91 at 98-101.

175. *Canadian Water: A Commodity for Export?* (Brief No. 307), by R.C. BOCKING, Ottawa, Inquiry on Federal Water Policy, 1985, p. 11.

Prerequisites

To begin with, the three conditions set forth under FTA 409.1 have no relevance to Canadian water exports unless :

1. Canada voluntarily chooses to export substantial quantities of water to the United States ; and
2. Canada imposes an export restriction which would violate Article XI of the GATT but for one of the four GATT exceptions named in FTA 409.1.

Exemptions

Of the thirteen exceptions contained in Articles XI and XX of the GATT, those upon which Canada could possibly rely to justify a QR on water exports are Articles XI.2(a), XX(b) or XX(g).

1. Article XI.2(a) of the GATT

Article XI.2(a), in contrast with Articles XX(b) and XX(g), could not be used by Canada to explain away a permanent prohibition or restriction on exports of water because of the critical word « temporarily » contained in this Article. In spite of this stricture, Article XI.2(a) could still be invoked to account for a water export ban provisionally erected to overcome severe water shortfalls caused by exceptional drought conditions such as those which occurred on the lower Mississippi River in the summer of 1988.

2. Article XX(b) of the GATT

The terms « necessary to protect human, animal or plant life or health », as found in Article XX(b) of the GATT, cannot by any means cover every conceivable situation. Nevertheless, they could certainly justify a QR imposed for ecological reasons. Therefore, as long as the purpose underlying the restriction relates to such reasons, Canada could clearly take advantage of Article XX(b). Yet, Mel Clark, while analyzing the interrelation of the FTA, the GATT and water, discussed the scope of Article XX(b) of the GATT and stated :

> The drafting history of [Article XX](b) suggests that it was primarily intended to permit the use of import restrictions required to enforce sanitary and health regulations, including quarantine. *No evidence could be found that (b) was also intended to be used as legal cover for export restrictions* [emphasis added][176].

176. M. CLARK, *Water, GATT and the FTA*, Ottawa, Rawson Academy of Aquatic Science, October 1988, para. 8 [unpublished].

Mr. Clark's statement is presumably founded on the following comment made by the Preparatory Committee in the context of the United Nations Conference on Trade and Employment held in Havana, from November 1947 to March 1948:

> The Committee agreed that quarantine and other sanitary regulations are a subject to which the Organization should give careful attention with a view to preventing measures « necessary to protect human, animal or plant life or health » from being applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade[177].

On the basis of the above, Mr. Clark's interpretation — that import restrictions with respect to sanitary and health regulations was the main preoccupation of the Committee in 1947-1948 — is undoubtedly correct. Nevertheless, though nothing in the drafting history of Article XX(b) hints that the Article « was also intended to be used as legal cover for export restrictions », neither is there an indication to the contrary[178]. Accordingly, as an exception to the prohibition prescribed in Article XI of the GATT, it is reasonable to argue that Article XX(b) could be used to justify not only QRs on imports but on exports as well. Finally, in the absence of any GATT panel decision disallowing a QR imposed by a contracting party on water exports for ecological reasons based on Article XX(b), the proposition is certainly defendable.

3. Article XX(g) of the GATT

Never has the issue of water been raised under Article XX(g) of the GATT[179]. However, it is suggested that the words « exhaustible natural resources » contained in this Article, might cover fresh water. Still, this view is not unanimously shared within the legal community, as one can see from the following comment made by Professor J. Owen Saunders:

> As to [...] Art. XX(g) — « measures relating to the conservation of *exhaustible* natural resources » [...] is it clear that water would qualify as such a resource in all, or even most, circumstances? Surely the more likely interpretation of « exhaustible » is one analogous to that of a non-renewable as opposed to a renewable resource — for example oil and other minerals as opposed to, say, water and fish[180].

177. *Analytical Index*, 3d rev., *supra*, note 132, p. 116.
178. See GATT, *Analytical Index*, GATT/LEG/2 (Geneva, GATT, 1985), art. XX(b).
179. See *id.*, art. XX(g).
180. J.O. SAUNDERS, *A Scenario for Water Export: Tanker Export with the Support of a Province*, Calgary, Canadian Institute of Resources Law, University of Calgary, 4 November 1988, p. 3 [unpublished].

Nonetheless, Professor Saunders' observation either discarded or failed to take into account the MacDonald Commission's assessment with respect to this fundamental issue. In its discussion of a new Canada-U.S. trade framework, the Commission expressed the opinion that special rules might be needed with regard to the natural resources sector and more specifically, with regard to non-renewable resources. It then stated:

> The most difficult negotiating problems are likely to centre on the potential use of export controls *covering non-renewable commodities such as oil and perhaps, in the future, water.* It is possible, for instance, that the United States may seek to negotiate some legal assurance of access to future Canadian resource supplies. Any guarantee to U.S. resource consumers must, however, preserve Canada's authority to limit exports in order to meet anticipated domestic requirements for such resources. Article XX(g) of the GATT permits signatories to maintain non-discriminatory measures « relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ». *A similar provision could be included in any general agreement covering trade in non-renewable resources* [emphasis added][181].

In light of the foregoing, it is legitimate to infer that Canada could impose a QR on exports of water to the United States based on Article XX(g) of the GATT[182].

Mechanism Set Up under FTA 409.1

Depending on the GATT exemption Canada would rely upon to impose a QR on water exports to the United States, different legal consequences would likely occur.

As discussed above, Canada could decide to put a restriction on water exports for the purpose of relieving a temporary shortage (GATT, Article XI.2(a)) or conserving an exhaustible natural resource (GATT, Article XX(g)). Contingent upon the restriction being justified under the GATT, the action taken by Canada would then trigger the application of FTA 409.1. Hence, the three conditions prescribed by the latter would have to be observed and, in particular, the proportionality requirement contained in FTA 409.1(a).

Nevertheless, Canada would not have to resort to one of the four GATT exceptions incorporated in FTA 409.1 to account for a prohibition

181. *Royal Commission, supra*, note 106, vol. 1, pt 2 at 310.

182. For a discussion of the scope of GATT, art. XX(g), see the 1987 GATT Panel decision concerning Canadian regulations prohibiting exports of unprocessed herring and salmon (GATT, 35th Supp. B.I.S.D. (1989) 98 paras. 4.6-4.7). See also T.L. MCDORMAN, « Using the Dispute Settlement Regime of the Free Trade Agreement: The West Coast Salmon and Herring Problem » (1990-91) 4 *C.U.B.L.R.* 177, 182-184.

or a restriction on water exports. Article XX(b) of the GATT provides a valid legal basis for imposing a QR on water exports for ecological reasons. Since the restriction would be justified under a GATT exception which is not referred to in FTA 409.1, Canada would then remain completely free to restrict exports of water without having to meet the three conditions imposed by FTA 409.1.

2.2.2.4 Comments

The FTA export provisions incontestably have several implications for Canadian water exports. On the one hand, under FTA 408, Canada could not use the indirect methods of a prohibitive export tax or other similar measures to raise the export price higher than the domestic price. Furthermore, if the QR aims to relieve a temporary shortage (GATT, Article XI.2(a)) or to conserve an exhaustible natural resource (GATT, Article XX(g)), Canada would become subject to the proportional sharing requirement prescribed by FTA 409.1(a). On the other hand, any fear that Canada's ability to control exports of water has been taken away is considerably alleviated by the explicit incorporation in the FTA of the « human, animal or plant life or health » exception contained in Article XX(b) of the GATT.

2.2.3 Nullification and Impairment Provisions

FTA 2011 provides that a Party may invoke the dispute resolution procedures contained in Chapter Eighteen of the FTA if it considers that the application of any proposed or actual measure causes or is likely to cause nullification or impairment of any benefit expected to accrue, directly or indirectly, to that Party under the FTA.

By reason of the fact that FTA 2011 entitles a Party to dispute any measure which impairs an advantage it reasonably expected to derive from the Agreement — even where there is no conflict with its provisions — the opponents maintain that this Article is « the most astounding provision in the Deal[183] ». In practical terms, this means that : « If the U.S. fails to gain access to our water under other provisions of the Deal, 2011 will provide them with an excellent opportunity to do so. To succeed all the U.S. will have [to] demonstrate is that it had a « reasonable expectation » that water would flow under the Deal[184]. »

This contention is unconvincing. First of all, FTA 2011 should not be viewed as a unique creation of the FTA. In fact, it was inspired in large

183. *An Environmental Guide to the Canada-U.S. Trade Deal, supra*, note 146, c. 20.
184. *Ibid.*

measure by Article XXIII of the GATT. In this regard, the GATT experience may be useful in determining whether nullification or impairment has effectively occurred[185]. Besides, as discussed earlier[186], neither FTA 409.1 nor any other provision of the FTA obliges Canada to sell its water to the United States. This is evidenced by the incorporation, through FTA 1201, of Article XX of the GATT. If no such obligation is borne by Canada, then no benefit whatsoever can be anticipated by the Americans. There is, therefore, little doubt that the « reasonable expectation » proof could hardly be demonstrated convincingly.

2.2.4 Section 7 of the *Implementation Act*[187]

The *Canada-United States Free Trade Agreement Implementation Act* came into force on the 1st of January 1989. It amends 27 statutes in order to make them consistent with the terms and conditions of the FTA. The original version of the implementing legislation, Bill C-130[188], had been introduced by the federal government on the 24th of May 1988. Bill C-130 had been approved in principle by the Senate before it died, following the dissolution of Parliament and the calling of a general election by Prime Minister Brian Mulroney, on the 1st of October 1988. Initially, Bill C-130 was silent with respect to the water question. However, the federal government, bowing to political pressure, decided to introduce an amendment to the legislation on the 28th of July 1988, to exclude specifically Canada's water. The proposed amendment, contained in section 7 of Bill C-130, stated :

> 7.(1) For greater certainty, nothing in this Act or the Agreement, except Article 401 of the Agreement, applies to water.
>
> (2) In this section, « water » means natural surface and ground water in liquid, gaseous or solid state, but does not include water packaged as a beverage or in tanks.

Although some technical modifications were made to the bill, when it was reintroduced for first reading in the House of Commons on the 14th of December 1988, section 7 was kept unchanged[189].

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185. For a discussion of the GATT dispute settlement procedures, see J.H. JACKSON and W.J. DAVEY, *Legal Problems of International Economic Relations*, 2nd ed., St-Paul, West, 1986, pp. 332-357 ; for a discussion of the FTA dispute settlement regime, see T.L. MCDORMAN, « The Dispute Settlement Regime of the Free Trade Agreement » (1988) 2 *R.I.B.L.* 303.
186. See *supra*, Section 2.2.2, « Export Provisions ».
187. *Implementation Act*, *supra*, note 115.
188. *Bill C-130*, *supra*, note 115.
189. See *Implementation Act*, *supra*, note 115, s. 7.

FTA's critics assert that the exclusion contained in section 7 of the *Implementation Act* is ineffective and lacks substance. It fails to safeguard Canadian water. Under international law, such a unilateral action on the part of Canada to exempt this resource from the scope of the FTA does by no means alter or palliate the effect of the provisions set out in the deal. Accordingly, unless the Agreement itself is amended and makes clear that water in its natural state is not subject to its application, the following consequence is clearly foreseeable : « the United States could argue the prohibition of water exports nullified its national treatment rights under the agreement and a binational panel probably would agree. In this situation, Canada would have to lift the prohibition or face retaliation[190]. »

Assuming that water in its natural state is a good covered by the deal and that the conditions prescribed by FTA 409.1 could apply, it is unquestionable that the proposition advanced by the opponents is irrefutable. Quite clearly, no state can rely on its domestic law to mitigate its international obligations. This rule is codified in Article 27 of the *Vienna Convention*[191] which reads : « A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty[192] ». However, their contention rests upon the hypothesis that the FTA hinders Canada from imposing any type of restrictions on water exports. As discussed earlier[193], this postulation is founded on tenuous grounds. Although FTA 409.1 circumscribes the circumstances in which Canada could otherwise impose QRs under the GATT, Canada's ability to veto exports of water is still preserved through Articles XX(b) and XX(g) of the GATT.

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190. *Water Is in the Deal*, *supra*, note 130 at 12. See also *Legislative Committee on Bill C-130*, No. 20, *supra*, note 116 at 20:15-20:16 (per Hon. L. Axworthy) ; *Selling Canada's Environment Short*, *supra*, note 174, p. 6 ; ONTARIO, STANDING COMMITTEE on FINANCE and ECONOMIC AFFAIRS, *Ontario Trade Review, 1988 : Report on the Canada-U.S. Free Trade Agreement*, vol. 1, Toronto Queen's Park, October 1988, p. 75 ; D. CRANE, « Crosbie Not Doing Enough, Say Critics of Water Exports » *Toronto Star*, 30 July 1988, Section A-10.

191. *Vienna Convention*, *supra*, note 135.

192. Article 27 of the *Vienna Convention* merely codifies customary rules of international law as interpreted by international courts. See, e.g., *The Wimbledon* (1923), P.C.I.J., Ser. A, No. 1 at 29 ; *Free Zones Case* (1929), P.C.I.J., Ser. A, No. 24 at 12 ; The Greco-Bulgarian « *Communities* » *Case*, Advisory Opinion (1930), P.C.I.J., Ser. B, No. 17 at 32 ; *Polish Nationals in Danzig*, Advisory Opinion (1932), P.C.I.J., Ser. A/B, No. 44 at 24 ; *Fisheries Case*, [1951] I.C.J. Rep. 116 at 132 ; *Nottebohm Case*, [1955] I.C.J. Rep. 4 at 20-21. See also J.-M. ARBOUR, *Droit international public*, Cowansville, Éditions Yvon Blais, 1985, pp. 87-88.

193. See *supra*, Section 2.2.2, « Export Provisions ».

2.3 Concluding Remarks

The FTA clearly could not and obviously did not grant Canada everything it wanted. It is quite naturally the net result of a complex series of trade-offs which could not possibly satisfy everyone on either side, let alone both sides of the border. Nevertheless, as far as the issue of water exports is concerned, nothing in the FTA suggests that Canada has conceded to the United States future access to its water resources. In fact, although it might have been wiser for Canada to require the explicit exclusion of water from the Agreement—if only to set its critics' mind at rest—there is little doubt that the FTA does not grant the United States any substantial new rights *vis-à-vis* Canada's water nor does it adversely reduce Canada's freedom to act in order to meet its own needs. On the one hand, the pact strictly provides for common rules for binational commerce in goods which are traded. However, since Canada has never made large-scale exports of water by diversion to the United States, and unless it voluntarily decides to do so in the future, these rules have no bearing in this connection. On the other hand, should water that sits in a basin or flows in a river be viewed as part of the deal, Canada would still be in a position to retain exclusive authority over its management, allocation, diversion, and so on. Indeed, neither the national treatment provisions, the export provisions, the nullification and impairment provisions nor section 7 of the *Implementation Act*, could validly be invoked to compel Canada to sell its water to the United States. Yet, in the event that any of these provisions could apply, the incorporation into the FTA of Articles XX(b) and XX(g) of the GATT, by reason of FTA 1201, constitutes a shield against any attack.

It may therefore be said—notwithstanding all the frantic and endless assertions to the contrary—that while the threat over further diversions of Great Lakes Basin water resources is still in the air, it has not intensified as a result of the conclusion of the FTA.

Conclusion

The Great Lakes water diversion issue is unquestionably one of the most potent illustrations of the significance of water in Canadian-U.S. relations. The ferocious struggle over these transboundary waters has not only underscored the unique and profound consideration given to this resource throughout North America, but has also revealed the way water has generally been managed until now on both sides of the common frontier. Indeed, for many years both Canada and the United States, consciously or not, have been deferring the costs of careless water-use practices to future generations. However, neither nation can afford to hold such an unmindful attitude any longer. It is now imperative, for the sake of

Canadian-U.S. water relations, to embark upon a concerted binational effort to institute improved management and conservation methods with respect to those waters crossing the border, along with specific actions to obtain unconditional support from every Canadian and American citizen. As the IJC emphasized:

> The shared waters of the Great Lakes have a regional, national and international significance that requires that they be treated as a joint responsibility of the Governments and peoples of both nations. They are a priceless natural resource in their own right. The multiplicity of uses to which they are put makes it imperative that closest attention be paid not only to the present needs of diverse users but also to the needs of future generations. The waters must be protected, conserved and managed with insight, determination and prudence if they are to continue to play the role they have played in the past[194].

Transboundary environmental relations and in particular, transboundary water relations are likely to constitute one of the main categories for bilateral policy-making in Canadian-U.S. relations during the remainder of the twentieth century. Indeed, few other concerns will foreseeably supplant the magnitude of the debate over water resources. It can only be hoped, therefore, that environmental integrity will be considered worthy compensation for the attention and diligence devoted to the resolution of the tremendous difficulties which underlie the issue of water export in North America.

The maintenance of friendship between Canada and the United States along their extensive frontier has been a paramount policy of both nations. Though problems over boundaries have inevitably arisen from time to time, the spirit of the *Treaty of Ghent, 1814*[195] that « [t]here shall be a firm and universal Peace between His Britannic Majesty and the United States and between their respective Countries, Territories, Cities, Towns and people[196] » has otherwise prevailed. This feeling of solidarity and unity, evidenced by the conclusion of the FTA and, more recently, that of the North American Free Trade Agreement (NAFTA), is worth preserving. Let us not allow a dispute over our shared and most valuable resource to put the future of this friendship in jeopardy.

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194. INTERNATIONAL JOINT COMMISSION, *supra*, note 3, p. 48.

195. *Peace and Amity (Treaty of Ghent)*, 24 December 1814, United States-United Kingdom, reprinted in *Treaties and Other International Agreements of the United States of America*, 1776-1949, vol. 12, Washington, D.C., U.S. Government Printing Office, 1974, p. 41, *Treaties and Agreements Affecting Canada, in Force Between His Majesty and the United States of America 1814-1925*, Ottawa: King's Printer, 1927, p. 1.

196. *Id.*, art. I.